TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 150

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY, ET AL., PETITIONERS,

vs.

NEW YORK STOCK EXCHANGE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 26, 1962

[fol. 1]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 27211

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY, and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-Appellees,

against

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

APPENDIX FOR DEFENDANT-APPELLANT AND
APPENDIX FOR PLAINTIFFS-APPELLEES

[fol. 2]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY, and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs,

against

NEW YORK STOCK EXCHANGE, Defendant.

COMPLAINT

Plaintiffs, by their attorneys, Bauman, Epstein & Horowitz, as and for their complaint, respectfully allege:

As and for a First Cause of Action:

First—At all times hereinafter mentioned, and since on or about September 1, 1956, plaintiff Harold J. Silver, doing business as Municipal Securities Company, (hereinafter referred to as "Silver") has and has had its principal office in Dallas, Texas.

Second—At all times hereinafter mentioned, and since on or about June 12, 1958, plaintiff Municipal Securities Company, Inc. (hereinafter referred to as "Municipal") was and still is a corporation organized and existing under the laws of the State of Texas.

Third—Upon information and belief, at all times hereinafter mentioned, defendant New York Stock Exchange was and still is an unincorporated association, doing business in the State of New York, with its principal offices at 11 Wall Street, in the City, State and Southern District of New York.

[fol. 3] Fourth—The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

Fifth—The jurisdiction of this Court is based upon diversity of citizenship, and Title 15, U. S. C. A., Sections 1, *et seq.*

Sixth—At all times hereinafter mentioned, the plaintiff Silver was and still is engaged in the business of purchasing and selling certain types of unlisted securities, principally municipal bonds.

Seventh—In order to properly conduct its business and provide necessary and essential services to its customers, said plaintiff, Silver, required facilities by means of which said plaintiff would be able to purchase and sell such securities.

Eighth—To acquire such facilities, Silver, in or about September, 1956, made an agreement with Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., named as co-conspirators but not as defendants herein, all of which were and

still are member firms of the defendant, New York Stock Exchange, wherein and whereby it was provided that if each of the said member firms named in this paragraph would have installed a private wire connection between its office and the offices of the said plaintiff, Silver, said plaintiff would, in return therefor, transact business interstate with each of said member firms, relative to the purchase and sale of such securities.

Ninth—Shortly thereafter, and pursuant to said agreement with Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., there were installed on plaintiff's premises private wire connections with each of the said member firms.

Tenth—At all times hereinafter mentioned, the plaintiff Municipal was and still is engaged in the business of [fol. 4] purchasing and selling corporate securities, namely corporate stocks and bonds.

Eleventh—In order to properly conduct its business and provide necessary and essential services for itself and its customers, said plaintiff required facilities by means of which said plaintiff Municipal and its customers could be apprised and informed as to the latest quotations of securities listed on the defendant, New York Stock Exchange, and by means of which said plaintiff, Municipal, and its customers could purchase and sell securities listed on said defendant, New York Stock Exchange, on which quotations had been so obtained.

Twelfth—To provide its customers with such facilities, the plaintiff, Municipal, in or about June, 1958, made application to the defendant, New York Stock Exchange, for a continuous stock quotations service supplied by ticker originating on the floor of the defendant, New York Stock Exchange; made an agreement with Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc. and Eppler, Guerin & Turner, named as co-conspirators but not as defendants herein, all of which were and still are member firms of the defendant, New York

Stock Exchange, wherein and whereby it was provided that if each of the said member firms aforementioned in this paragraph would have installed a private wire connection between its offices and those of the plaintiff, Municipal, said plaintiff would, in return therefor, and in behalf of itself and its customers, transact business interstate with each of said member firms relative to the purchase and sale of securities listed on the defendant, New York Stock Exchange; and made an agreement with Straus, Blosser & McDowell, named as a co-conspirator but not as a defendant herein, which was and still is a member firm of the defendant, New York Stock Exchange, wherein and whereby [fol. 5] it was provided that if the said member firm would arrange to have installed a teletype between its offices and those of the plaintiff, plaintiff would, in return therefor, and in behalf of itself and its customers, transact business interstate with said member firm relative to the purchase and sale of securities listed on the defendant, New York Stock Exchange.

Thirteenth—Thereafter, and on or about June 25, 1958, the plaintiff, Municipal, was notified by the defendant, New York Stock Exchange, that its application for continuous stock quotations service supplied by ticker had been approved, and thereafter, there was installed in the offices of the said plaintiff, such stock quotations service.

Fourteenth—Thereafter, in or about July, 1958, and pursuant to the said agreement with the member firms, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas, Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., and Eppler, Guerin & Turner, there were installed on the premises of the plaintiff, Municipal, private wire connections with each of the said member firms.

Fifteenth—Thereafter, in or about October, 1958, and pursuant to the said agreement with the member firm, Straus, Blosser & McDowell, there was installed on the premises of the plaintiff, Municipal, a teletype between itself and said member firm.

Sixteenth—Thereafter, and beginning in or about January, 1959, the defendant, New York Stock Exchange, willfully, unlawfully, knowingly, and maliciously confederated, combined, conspired and agreed with Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., Dallas Union Securities Co., [fol. 6] Inc., Eppler, Guerin & Turner, and Straus, Blosser & McDowell, named as co-conspirators but not as defendants herein, to prevent the plaintiff, Silver, from continuing to have use of the aforesaid private wire connections, by means of which business had been and was being transacted interstate, as hereinbefore alleged; from continuing to have use of the aforesaid stock quotations service, the aforesaid private wire connections, and the aforesaid teletype, by means of all of which business had been and was being transacted interstate, as hereinbefore alleged.

Seventeenth—It was a part of said conspiracy that the defendant, New York Stock Exchange, would induce co-conspirators Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc. to breach their aforesaid agreement with the plaintiff, Silver, providing for private wire connections between the offices of said co-conspirators and said plaintiff.

Eighteenth—It was a further part of said conspiracy that the said co-conspirators having been so induced by the defendant, New York Stock Exchange, to breach their aforesaid agreements with the said plaintiff, Silver, would discontinue and remove said private wire connections with the said plaintiff.

Nineteenth—It was a further part of said conspiracy that the defendant, New York Stock Exchange, would discontinue and remove the stock quotations service with the plaintiff, Municipal.

Twentieth—It was a further part of said conspiracy that the defendant, New York Stock Exchange, would induce the co-conspirators Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F.

Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., Dallas Union Securities Co., Inc., and Eppler, Guerin & Turner, to breach their aforesaid agreements [fol. 7] with the said plaintiff, Municipal, providing for private wire connections between the offices of said co-conspirators and said plaintiff.

Twenty-first—It was a further part of said conspiracy that the co-conspirators Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., Dallas Union Securities Co., Inc., and Eppler, Guerin & Turner, having been so induced by the defendant, New York Stock Exchange, to breach their aforesaid agreements with the said plaintiff, Municipal, would discontinue and remove said private wire connections with the said plaintiff.

Twenty-second—It was a further part of said conspiracy that the defendant, New York Stock Exchange, would induce the co-conspirator, Straus, Blosser & McDowell, to breach its aforesaid agreement with the plaintiff, Municipal, providing for a teletype between the office of said co-conspirator Straus, Blosser & McDowell, and the office of the said plaintiff.

Twenty-third—It was a further part of said conspiracy that the said co-conspirator, having been so induced by the defendant, New York Stock Exchange, to breach its aforesaid agreement with the said plaintiff, Municipal, would discontinue and remove said teletype between the office of said co-conspirator, Straus, Blosser & McDowell, and the office of the said plaintiff.

Twenty-fourth—In pursuance of said conspiracy and for the purpose of carrying out its objects and purposes, in or about February, 1959, the co-conspirators, Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc. did in fact discontinue and remove their aforesaid private wire connections with the plaintiff, Silver; in further pursuance of said conspiracy [fol. 8] and for the purpose of carrying out its objects and

purposes, the defendant, New York Stock Exchange, did in fact discontinue and remove the aforesaid stock quotations service of the plaintiff, Municipal; in further pursuance of the conspiracy and for the purpose of carrying out its objects and purposes, the co-conspirators Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., and Eppler, Guerin & Turner did in fact discontinue and remove their aforesaid private wire connections with the plaintiff, Municipal; in further pursuance of said conspiracy and for the purpose of carrying out its objects and purposes, the co-conspirators Straus, Blosser & McDowell did in fact discontinue and remove the teletype between itself and the plaintiff, Municipal.

Twenty-fifth—All of the aforesaid acts of the defendant and said co-conspirators were done maliciously, willfully, knowingly, unlawfully and without just cause or provocation, with the unlawful and illegal intent, purpose and object of restraining and preventing plaintiffs from exercising an essential and necessary part of their lawful trade or business in interstate trade or commerce; preventing the plaintiffs from rendering to its customers in interstate trade or commerce, the services necessary and essential for the continuation of the plaintiffs' business, and for the purpose of unlawfully and illegally eliminating said business of plaintiffs in interstate commerce.

Twenty-sixth—All of the aforesaid acts of the defendant were in violation of the provisions of Title 15, U.S. C.A., Sections 1, *et seq.*, and in particular the acts of Congress of July 2, 1890, and October 15, 1914, commonly known as the Sherman Anti-Trust Act, and the Clayton Act, and the subsequent acts of Congress amendatory and supplemental thereto.

[fol. 9] Twenty-seventh—As a result of the wrongful acts of the defendant and the co-conspirators, plaintiffs have sustained great loss and damage which has been inflicted upon them by virtue of the said conspiracy and the acts of the defendant and the said co-conspirators done in pur-

suance thereof; the business, trade and good will of the plaintiffs have been and will continue to be substantially curtailed, impaired, interfered with, and damaged; unless the defendant and the said co-conspirators are properly restrained, the plaintiffs will be unlawfully restricted and prevented from the lawful conduct of their business interstate; the plaintiffs have lost customers, patronage and trade and have been prevented and deterred from continuing and expanding and increasing their businesses as they otherwise would have done; and the said defendant and said co-conspirators intended that plaintiffs should be damaged, put to expense and lose customers, trade and profits as a result of their acts.

Twenty-eighth—As a result of the aforesaid acts, the plaintiff Silver has sustained damages in the amount of Five Hundred Thousand ($500,000.00) Dollars, and is entitled to recover under the acts of Congress of July 2, 1890 and October 15, 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act, threefold the amount of said damages, to wit: One Million, Five Hundred Thousand ($1,500,000.00) Dollars.

Twenty-ninth—As a result of the aforesaid acts, the plaintiff Municipal has sustained damages in the amount of Five Hundred Thousand ($500,000.00) Dollars, and is entitled to recover under the acts of Congress of July 2, 1890 and October 15, 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act, threefold the amount of said damages, to wit: One Million, Five Hundred Thousand ($1,500,000.00) Dollars.

Thirtieth—The acts of the defendant and said co-conspirators herein are continuing and the defendant and said [fol. 10] co-conspirators threaten to continue to commit such acts in the future, all of which will cause the plaintiffs to continue to suffer substantial and irreparable harm and damage; and unless this Court restrain the defendant and said co-conspirators from the continuance of the said wrongful and unlawful acts, the plaintiffs will be without remedy and they will suffer the loss of their investment in their said businesses and an action at law for damages

will not avail them and the plaintiffs will be compelled to bring a multiplicity of suits.

Thirty-first—The plaintiffs are without any adequate remedy at law.

Thirty-second—That the plaintiffs are entitled to reasonable attorneys' fees.

As and for a Second Cause of Action:

Thirty-third—Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth of the complaint hereof with the same force and effect as though fully set forth and repeated herein.

Thirty-fourth—At all times hereinafter mentioned the defendant, New York Stock Exchange, had due notice and knowledge (a) of the contracts, as alleged in paragraph Eighth herein, between Silver and the member firms, Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., providing for private wire connections between Silver and each of said member firms; of the member firms of the defendant (b) of the contracts, as alleged in paragraph Twelfth herein, between Municipal and the member firms, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, [fol. 11] Pierce & Co., Inc., and Eppler, Guerin & Turner, providing for private wire connections between Municipal and each of said member firms; and (c) of the contract, as alleged in paragraph Twelfth herein between Municipal and the member firm, Straus, Blosser & McDowell, providing for the teletype service between Municipal and said member firm.

Thirty-fifth—Notwithstanding the fact that the defendant had due knowledge and notice of all of the said contracts between the plaintiffs and said member firms, the defendant unlawfully, willfully, knowingly, wrongfully, intentionally, maliciously, arbitrarily and without reason-

able cause or justification or excuse, induced, persuaded and enticed all of the said member firms, named herein as co-conspirators, to violate, repudiate and break the said agreements with the plaintiffs and to refuse to proceed or perform further thereunder.

Thirty-sixth—That by reason of the fact that the said member firms were induced to violate, repudiate and break their said agreements, as aforesaid, the plaintiffs have sustained great loss and damage; have been and will continue to have their business, trade and good will substantially curtailed, impaired, interfered with, and damaged; have been unlawfully restricted and prevented from the lawful conduct of their businesses interstate, and have lost customers, patronage and trade.

Thirty-seventh—As a result of the aforesaid acts, the plaintiff Silver has sustained damages in the amount of Five Hundred Thousand ($500,000.00) Dollars.

Thirty-eighth—As a result of the aforesaid acts, the plaintiff Municipal has sustained damages in the amount of Five Hundred Thousand ($500,000.00) Dollars.

As and for a Third Cause of Action:

Thirty-ninth—Plaintiffs repeat, reiterate, and reallege each and every allegation contained in paragraphs First, [fol. 12] Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Thirty-fourth and Thirty-fifth of the complaint hereof with the same force and effect as though fully set forth and repeated herein.

Fortieth—That the defendant, in inducing the member firms, Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., to breach their contracts with plaintiff, Silver; in inducing the member firms, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., and Eppler, Guerin & Turner to breach their contracts with

the plaintiff, Municipal; in inducing the member firm, Straus, Blosser & McDowell to breach its contract with the plaintiff, Municipal, and in removing the stock quotation service between itself and the plaintiff, Municipal, acted unlawfully, willfully, knowingly, wrongfully, intentionally, maliciously, arbitrarily, and without reasonable cause, justification or excuse, and with intent to injure the plaintiffs.

Forty-first—Said wrongful acts of the defendant have seriously impaired the vested property rights of the plaintiffs, were calculated to and did cause grief and irreparable harm to plaintiffs, have and will continue to curtail, impair, interfere with, and damage, plaintiffs' trade, businesses and good will; have and will continue unlawfully to restrict and prevent plaintiffs from the lawful conduct of their businesses; have caused and will continue to cause plaintiffs to lose customers, patronage and trade.

Forty-second—As a result of the aforesaid acts, the plaintiff Silver has sustained damages in the amount of Five Hundred Thousand ($500,000.00) Dollars.

Forty-third—As a result of the aforesaid acts, the plaintiff Municipal has sustained damages in the amount of Five Hundred Thousand ($500,000.00) Dollars.

[fol. 13] Wherefore, the plaintiffs demand judgment:

(1) That the defendant and the agents and officers of each of them and all persons combining with or acting in concert with them or under their direction be perpetually and during the pendency of this action restrained and enjoined from conspiracy and combining to interfere with the free exercise by plaintiffs of their businesses.

(2) That the defendant, New York Stock Exchange, be ordered perpetually and during the pendency of this action to have reinstated plaintiffs' stock quotations service.

(3) That the defendant be restrained and enjoined perpetually and during the pendency of this action from in any way urging, advising, inducing, coercing, or by any act, device, or method, persuading any persons or parties from interfering with plaintiffs' use of the private wire

connections and teletype services with the said member firms, as herein alleged.

(4) On the first cause of action, plaintiff, Silver, demands judgment against the defendant in the sum of One Million, Five Hundred Thousand ($1,500,000.00) Dollars, the same being threefold the damages by it sustained, together with reasonable attorneys' fees, and the plaintiff, Municipal, demands judgment against the defendant in the sum of One Million, Five Hundred Thousand ($1,500,000.00) Dollars, the same being threefold the damages by it sustained, together with reasonable attorneys' fees.

(5) On the second cause of action, the plaintiff, Silver, demands judgment against the defendant in the sum of Five Hundred Thousand ($500,000.00) Dollars, and the plaintiff, Municipal, demands judgment against the defendant in the sum of Five Hundred Thousand ($500,000.00) Dollars.

[fol. 14] (6) On the third cause of action, the plaintiff, Silver, demands judgment against the defendant in the sum of Five Hundred Thousand ($500,000.00) Dollars, and the plaintiff, Municipal, demands judgment against the defendant in the sum of Five Hundred Thousand ($500,000.00) Dollars.

(7) That plaintiffs have such other and further relief as to this Honorable Court may seem just and proper in the premises, together with the costs and disbursements of this action.

Bauman, Epstein & Horowitz, By Arnold Bauman, Partner, Attorneys for Plaintiffs, Office & P. O. Address, 640 Fifth Avenue, New York 19, New York.

(Verified by Arnold Bauman, April 3, 1959.)

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANSWER

Defendant, by Milbank, Tweed, Hope & Hadley, its attorneys, for answer to the complaint:

1. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every [fol. 15] allegation contained in paragraphs First and Second, except it was informed on or about June 13, 1958, and believes and therefore admits that Municipal Securities Company, Inc., (herein called "Municipal") was a corporation organized and existing under the laws of the State of Texas.

2. Denies each and every allegation contained in paragraphs Fourth and Fifth, except it admits that the jurisdiction of the Court is attempted to be based upon the grounds and statutes referred to therein.

3. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh, except it admits that in September, 1956, Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., were and still are member firms of defendant and that Municipal in its application to defendant for private wire connections dated June 13, 1958, stated it was a general securities dealer.

4. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs Twelfth, Thirteenth, Fourteenth and Fifteenth, except it admits that during June and July, 1958, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Company, E. F. Hutton & Company, Dallas, Rupe & Son, Inc., Rauscher, Pierce & Co. Inc., and Eppler, Guerin & Turner, Inc., were and still are member firms of defendant; that, with the exception of Merrill Lynch, Pierce, Fenner & Smith, Inc., each re-

quested defendant's permission to establish a private wire connection with Municipal; that by written application dated June 13, 1958, Municipal applied to defendant for approval of private wire connections with each of them; that defendant gave temporary approval to the requests [fol. 16] of the member firms and to the application of Municipal; that in October, 1958, Straus, Blosser & McDowell, a member firm of defendant, requested defendant to grant them permission to install a private wire over Western Union facilities to Municipal and defendant granted temporary approval to such request; that by application dated June 23, 1958, Municipal applied to defendant for continuous quotations of defendant and on June 25, 1958, defendant granted Municipal temporary approval thereof.

5. Denies each and every allegation contained in paragraphs Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, Thirty-first, Thirty-second, Thirty-fourth, Thirty-fifth, Thirty-sixth, Thirty-seventh, Thirty-eighth, Fortieth, Forty-first, Forty-second and Forty-third.

And for a first, separate and complete defense to each cause of action, defendant alleges:

6. This Court is without jurisdiction over the subject matter in that diversity of citizenship is lacking as to each cause of action, in that none of the causes of action involves a dispute or controversy respecting the validity, construction or effect of the laws of the United States upon the determination of which the result depends, and in that each cause of action is separate and distinct from the other causes of action.

Milbank, Tweed, Hope & Hadley, By A. Donald MacKinnon (a member of the firm), 15 Broad Street, New York 5, New York, Attorneys for Defendant.

[fol. 17]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION—April 26, 1960

Pursuant to Rule 56(a) and (c) of the Federal Rules of Civil Procedure, plaintiffs move for partial summary judgment under section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. §26, permanently enjoining and restraining defendant New York Stock Exchange from in any manner: (1) preventing, prohibiting or attempting to prevent or prohibit the maintenance and operation of private wire connections between plaintiffs and defendant's member firms; (2) coercing, compelling or attempting to coerce or compel its member firms from exercising a right of individual action concerning the maintenance and operation of private wire connections between plaintiffs and said member firms; (3) enforcing or threatening to enforce the several provisions of its Constitution and Rules, through which, by threat of disciplinary proceedings or imposition of other sanctions, defendant restrains, and is authorized to restrain arbitrarily, the exercise of a member firm's right of independent action concerning the maintenance and operation of private wire connections; and (4) refusing and continuing to refuse to furnish plaintiff Municipal Securities Company, Inc. (hereinafter referred to as "MSC, INC") continuous stock quotations service and, at the same time, provide and continue to provide such service to MSC, INC's competitors in the relevant over-the-counter corporate securities market on the ground that there is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law on the first cause of action set forth in their complaint (alleging a violation [fol. 18] of the Federal anti-trust laws), except with respect to the amount of damages.

In the event that the aforesaid motion for partial summary judgment is denied, plaintiffs will request that this Court: (1) enter an order in accordance with Rule 56(d) of the Federal Rules of Civil Procedure, specifying the

facts that appear without substantial controversy; (2) certify that the order denying summary judgment is appropriate for immediate appeal to the Court of Appeals in accordance with section 1292(b) of Title 28, United States Code; and (3) grant such other, further, or different relief as may seem just and proper.

In addition thereto, plaintiff Harold J. Silver, d/b/a Municipal Securities Company (hereinafter referred to as "MSC"), moves this Court pursuant to Rule 65(a) of the Federal Rules of Civil Procedure for an order enjoining and restraining defendant New York Stock Exchange from in any manner: (1) preventing, prohibiting or attempting to prevent or prohibit the maintenance and operation of private wire connections between plaintiff MSC and defendant's member firms; (2) coercing, compelling or attempting to coerce or compel its member firms from exercising a right of individual action concerning the maintenance and operation of private wire connections between plaintiff MSC and said member firms; and (3) enforcing or threatening to enforce the several provisions of its Constitution and Rules, through which, by threat of disciplinary proceedings or imposition of other sanctions, defendant restrains, and is authorized to restrain arbitrarily, the exercise of a member firm's right of individual action concerning the maintenance and operation of private wire connections.

As further grounds for the relief herein requested, plaintiffs refer this Court to the affidavits and exhibits [fol. 19] hereto annexed and the pleadings, affidavits and depositions heretofore taken in this cause.

Dated: April 26, 1960.

Dickstein, Shapiro & Galligan, By Sidney Dickstein, A Member of the Firm, 20 East 46th Street, New York 17, New York.

Goldberg, Fonville, Gump & Strauss, By Robert S. Strauss, A Member of the Firm, 2232 Republic National Bank Building, Dallas 1, Texas.

Attorneys for Plaintiffs.

David I. Shapiro, 1411 K Street, N. W., Washington 5, D. C., Of Counsel.

[fol. 20]

NOTICE OF MOTION

To: Milbank, Tweed, Hope & Hadley, Esqs., Attorneys for Defendant:

Please Take Notice that the undersigned will bring the above motions on for hearing before this Honorable Court at Room 506, United States Courthouse, Foley Square, New York, New York, on the 10th day of May, 1960, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dickstein, Shapiro & Galligan, By Sidney Dickstein, A Member of the Firm, 20 East 46th Street, New York 17, New York, Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF HAROLD J. SILVER

State of Texas,
County of Dallas, ss.:

Harold J. Silver, being duly sworn, deposes and says:

I am the sole proprietor of plaintiff Municipal Securities Company and president and sole stockholder of plaintiff Municipal Securities Company, Inc. I submit this affidavit in support of the motions of plaintiffs herein.

[fol. 21] Introduction.

Plaintiff Municipal Securities Company (hereinafter referred to as "MSC" or the "proprietorship") is a sole proprietorship registered to do business under that name in accordance with the laws of the State of Texas and having an office for the doing of business in the City of Dallas, Texas. MSC is engaged exclusively in the securities business. Virtually all of its activities are concerned with transactions in securities known as municipal bonds.

Plaintiff Municipal Securities Company, Inc. (hereinafter referred to as "MSC, INC." or the "corporation") is a corporation organized and existing under the laws of the State of Texas and has its principal office in the City of Dallas, Texas. Formerly, MSC, INC. was actively engaged in the securities business in the over-the-counter corporate securities market. For reasons which will subsequently appear, MSC, INC. is no longer actively engaged in this business, despite the fact that it has retained its corporate existence.

Defendant New York Stock Exchange (hereinafter referred to as "NYSE" or the "Exchange") is an unincorporated association doing business in the State of New York, with its principal office located at 11 Wall Street, New York City. The Exchange has 1,375 members and is authorized to have an unlimited number of allied members. An "allied member" is a general partner in a member firm doing business as a partnership or an owner of voting stock in a member corporation. A "member firm" is a firm transacting business as a broker or dealer in securities at least one of whose general partners is a member of the Exchange. A "member corporation" is a corporation transacting business as broker or dealer in securities, which has one or more directors who are members of the Exchange. I am informed that the object and purpose of the Exchange is to provide facilities for its members to transact business in securities listed for trading and traded on the Exchange.

[fol. 22] The complaint states three causes of action. The first alleges that in January, 1959 the NYSE entered into a conspiracy in violation of the Federal Anti-Trust Laws with certain of its designated member-firms to prevent plaintiffs from continuing to have the use of NYSE's continuous stock quotation service and to prevent plaintiffs from having private wire connections with said member-firms. The second alleges that the Exchange tortiously induced its member-firms to breach their contracts for wire connections with plaintiffs. The third alleges the commission of the tort of intentional and wrongful harm without reasonable cause therefor. The instant motions for preliminary injunction and partial summary judgment are

directed solely to the defendant's alleged violations of the anti-trust laws as set forth in the first cause of action.

Description of Motions.

In the first instance, plaintiffs move for partial summary judgment restraining defendant New York Stock Exchange from, in any manner: (1) preventing, prohibiting or attempting to prevent or prohibit the maintenance and operation of private wire connections between plaintiffs and defendant's member-firms; (2) coercing, compelling or attempting to coerce or compel its member-firms from exercising a right of individual action concerning the maintenance and operation of private wire connections between plaintiffs and said member-firms; (3) enforcing or threatening to enforce the several provisions of its Constitution and Rules, through which, by threat of disciplinary proceedings or imposition of other sanctions, defendant restrains, and is authorized to restrain arbitrarily, the exercise of a member-firm's right of individual action concerning the maintenance and operation of private wire connections; and (4) refusing and continuing to refuse to furnish plaintiff MSC, INC. continuous stock quotation service and, at the same time, provide and continue to provide such service [fol. 23] to MSC, INC.'s competitors (which include both member-firms as well as non-member firms) in the relevant over-the-counter corporate securities market on the ground that there is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law on the first cause of action, except with respect to the amount of damages.

In the event this motion for partial summary judgment is denied, plaintiffs request that this Court: (1) enter an order in accordance with Rule 56(d) of the Federal Rules of Civil Procedure, specifying the facts that appear without substantial controversy and (2) certify that such order is appropriate for immediate appeal to the Court of Appeals in accordance with Section 1292(b) of Title 28, United States Code.

At the same time and independently of the motion for partial summary judgment, plaintiff MSC moves for pre-

liminary injunctive relief pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

Organization of Municipal Securities Company.

On August 12, 1955, I formed Intercontinental Securities Company, a sole proprietorship, for the purpose of engaging in the securities business. On that day the name "Intercontinental Securities Company" was registered in Dallas County, Texas (the name and style, Municipal Securities Company, under which this suit is brought, is essentially the same business, the change of name having been effected on September 10, 1956). On August 12, 1955, I applied for a license as an Individual Securities Dealer or Broker to the Securities Division, Office of the Secretary of State, State of Texas. My application was approved and a license issued effective August 16, 1955.

My first office was located at 507 Meadows Building, Dallas. At the time the business was formed and for some time thereafter I had no employees, the business being conducted entirely by me. On November 8, 1955, I filed an [fol. 24] application with the Securities and Exchange Commission (SEC) for registration as a broker-dealer. This registration was granted effective December 9, 1955. A copy of the letter of registration is annexed hereto as Exhibit 1.

On November 9, 1955, I applied for membership in the National Association of Securities Dealers, Inc. (NASD). The NASD is a national securities association organized pursuant to Section 15A of the Securities Exchange Act of 1934, as amended. The Board of Governors of the NASD is empowered to adopt and has adopted a Uniform Practice Code which governs the activities between NASD members in dealing in over-the-counter transactions unless the parties make specific agreement otherwise. I was admitted to membership in the NASD on January 10, 1956. A copy of my letter of admission is annexed hereto as Exhibit 2.

The proprietorship was formed with an initial capitalization of $25,000. During the balance of 1955 I made additional contributions to capital in the amount of $735,000.

The business of the proprietorship consisted almost in its entirety of buying, selling, and underwriting municipal

bonds. The total dollar volume of transactions by the proprietorship in 1955 was $797,521.77. During the year 1956 the proprietorship participated in the underwriting of the following municipal issues, among others: Aldine I. S. D.; Brazoria County, R. D. No. 33, Nederland I. S. D.; City of Pampa, G. O. The total dollar volume of proprietorship transactions in 1956 was $7,892,410.18.

During the year 1957 the proprietorship acted as manager or co-manager of the following municipal underwritings: Big Spring, G. O.; Frionia, I. S. D.; Garland, I. S. D.; City of Grand Prairie, G. O.; Howard County, C. S. D. No. 6; Pettit, I. S. D.; Petersburg, I. S. D.; Smyer, I. S. D.; Sterling City, G. O. Bonds; Sterling City Revenue; Terry County Airport; and in addition participated in the underwriting of the following municipal issues: City of Amarillo, G. O.; Blackwell, R. H. S. D.; Calhoun County, P. I.; Friendship, R. H. S. D.; Fort Worth, I. S. D.; Gainesville, [fol. 25] I. S. D.; Garland Electric W. & S. S. Revenue; Houston, I. S. D. Bonds; Hardin County Ctse. & Jail; City of Houston, Water Revenue; City of Houston, G. O.; Port Arthur, I. S. D.; State of North Dakota G. O.; State of South Carolina Highway; Stinnett, I. S. D.; Temple Water & Sewer Revenue. The total dollar volume of proprietorship transactions in 1957 was $20,044,661.07.

During the year 1958 the proprietorship acted as manager or co-manager of municipal underwritings such as: Town of Allen Revenue; Bedford, C. S. D. No. 33; Bynum, I. S. D.; Cameron County, Road Bonds; Carney, R. H. S. D.; Cleveland, I. S. D.; and others. In addition, MSC participated in the underwriting of the municipal issues such as: Board of Regents, University of Texas; City of Aransas Pass, G. O.; Austin, I. S. D.; City of Austin, Revenue, Birdville, I. S. D.; Corpus Christi, G. O.; and others. The total dollar volume of proprietorship transactions in 1958 was $54,607,729.22.

During the year 1959 the proprietorship acted as manager or co-manager of municipal underwritings such as: City of Abernathy, G. O.; Anderson Co., C. S. D. No. 3; Atascaso County, R. D. No. 3A Refunding; City of Booker, G. O.; City of Booker, Revenue; Bridgeport, I. S. D.; and

others. In addition, MSC participated in the underwriting of the following municipal issues: Abernathy, I. S. D.; Abilene, I. S. D.; City of Abilene, G. O.; City of Alpine, G. O.; Amarillo Jr. College District; City of Andrews, Revenue; Archer County Hospitals; City of Beaumont, G. O.; Bexar County Jail Bonds; Borden County, I. S. D.; Central, I. S. D.; City of Dallas, W. W. & San. S. S. Revenue; City of Freeport, Revenue; City of Freeport, G. O.; Hall County Hospital; Hidalgo County, R. D. No. 11; Hurst Euless Cons., I. S. D.; Hurst Euless Cons., I. S. D.; Killeen, I. S. D.; Lamesa, I. S. D.; State of New Jersey; Nederland Water & Sewer Tax Bonds; New Caney, I. S. D.; State of New Jersey; North East, I. S. D.; Nueces County Navigation Dist. No. 1; Post Cons., I. S. D.; Robinson, I. S. D.; [fol. 26] West Texas State College Stadium Rev.; Anderson County, C. S. D. No. 7; Bexar Co., W. C. I. D. #16; Bexar Co., W. C. I. D. #17; Town of Shellytown, G. O. The total dollar volume of proprietorship transactions in 1959 was $31,762,532.07.

From the commencement of business in August, 1955 until August, 1956 the proprietorship enjoyed a slow, but steady growth. In August, 1956, I employed Mr. D. Edward Walton as Manager. Mr. Walton had had many years experience in the handling of municipal bond transactions while employed with various banks and securities houses in the State of Texas. Shortly after his employment, the name of the proprietorship was changed to Municipal Securities Company and the proprietorship moved to new and expanded offices in the First National Bank Building in Dallas. All appropriate agencies and organizations were advised of the change of name and address and Mr. Walton was registered as an MSC Representative with the NASD.

After Mr. Walton's employment by MSC, the business was further expanded. On or about September 1, 1956, direct private telephone wires were installed between the office of MSC and the municipal bond departments in the Dallas offices of both Merrill Lynch, Pierce, Fenner & Beane and Rauscher, Pierce & Company, member-firms of the Exchange, and also with the First Southwest Co., a non-member. Direct private wires were also installed to the

bond departments of the First National Bank, the Republic National Bank and the Mercantile National Bank. With the installation of these private wires, MSC was equipped to engage in a trading business in municipal bonds. (In May, 1958, an additional direct wire was installed between MSC's office and the office of the Dallas Union Securities Company). Mr. Edward Jilek was hired to act as a municipal bond trader on September 15, 1956.

On March 15, 1957, MSC opened an additional office in Lubbock, Texas. In January, 1958, another office was opened in San Antonio, Texas. On August 25, 1958, MSC [fol. 27] opened another branch in Longview, and on January 1, 1959 still another in Amarillo. As MSC's business increased there was, of course, a need for additional employees. The average monthly payroll for the last four months of 1956 was approximately $3,250.00. The average monthly payroll for 1957 was approximately $4,700.00. The average monthly payroll for the year 1958 was approximately $8,250.00. At the end of 1956 the proprietorship had 5 employees, at the end of 1957 it had 8 employees, and by the end of 1958 it had 16 employees.

The Organization and Growth of Municipal Securities Company, Inc.

In 1958, with MSC's municipal bond business well under way, I began to think in terms of organizing a division or department within MSC, the sole function of which would be to engage in corporate securities transactions. My plans in this direction materialized in early June, 1958 when I was introduced to Harry F. Reed. Mr. Reed had been employed in the securities business in various capacities since 1926 and had substantial experience as a "trader" with various securities houses in the City of Dallas. Arrangements were made for the formation of a corporation to be concerned primarily with corporate securities transactions in the over-the-counter securities market and for Mr. Reed's employment by the corporation as a corporate securities trader under a salary and profit-sharing arrangement.

On June 12, 1958 MSC, Inc. was duly incorporated in the State of Texas. The officers of the corporation were myself, as president and director, D. Edward Walton, vice president and director, and my wife, Evelyn B. Silver, secretary-treasurer and director. My wife's position in the corporation was that of a nominal officer since she played no active role in the business. All of the stock of MSC, Inc. was and still is owned by me.

[fol. 28] On June 13, 1958, MSC, Inc. applied to the Securities and Exchange Commission (SEC) for registration as a broker-dealer in accordance with Section 15 of the Securities Exchange Act of 1934 as amended. Registration became effective June 27, 1958. A copy of this letter of registration is annexed hereto as Exhibit 3. On June 13, 1958, MSC, INC. applied to the State Securities Board, State of Texas for a license as a General Securities Dealer. This license was issued July 2, 1958. On June 18, 1958, MSC, INC. applied for membership in the NASD and on July 1, 1958 the application was approved by the NASD's Board of Governors.

On June 13, 1958, Mr. Reed prepared (and I executed) an application to the NYSE for private wire connections and a form entitled "Information To Be Furnished By Non-Member For Private Wire Connections Or Ticker Service," copies of which are annexed hereto as Exhibits 4 and 5, respectively. Since Mr. Reed was familiar with the NYSE's requirements for stock ticker service and private wire connections, the appropriate arrangements were made by him. The application forms were sent to the NYSE on the date of their execution. The application for private wire connections listed the offices of Rauscher, Pierce & Co.; Dallas Rupe & Son; Eppler, Guerin & Turner; Merrill Lynch, Pierce, Fenner & Smith; Sanders & Co.; Harris Upham & Co.; Goodbody & Co.; E. F. Hutton & Co. and Schneider, Bernet & Hickman as the NYSE member firms with whom MSC, INC.'s office would be connected by private wire.

On June 2, 1958, E. F. Hutton & Co. made a letter application to the NYSE for a private wire connection with MSC, INC. A copy of this letter is annexed hereto as Exhibit 6. Similar applications were made by Dallas, Rupe

& Son, Inc. on the same day; Sanders & Company on June 10, 1958; Harris, Upham & Co. on June 16, 1958; Goodbody & Co. on June 17, 1958; Schneider, Bernet & Hickman, Inc. [fol. 29] on June 24, 1958; Rauscher, Pierce & Co., Inc. on June 26, 1958; and Eppler, Guerin & Turner, Inc. on June 26, 1958. Copies of the foregoing letter applications are annexed hereto as Exhibits 7, 8, 9, 10, 11, 12 and 13 respectively. Apparently, no letter application was ever made by Merrill Lynch, Pierce, Fenner & Smith, although I am now informed that under the NYSE's Constitution and Rules it should have done so prior to establishing a private wire connection between its office and that of a non-member firm. I am also informed that "temporary approvals" of those private wire connections for which proper application had been made were granted by the NYSE at various times during the period June 18, 1958 through August 13, 1958.

On June 23, 1958 MSC, INC. mailed to the NYSE an "Agreement for Continuous Quotations of the New York Stock Exchange" (stock ticker service). A copy of this agreement is annexed hereto as Exhibit 14. On June 25, 1958, the NYSE advised MSC, INC. that its "application for continuous stock quotations service had been temporarily approved, pending further processing." A copy of the letter of June 25, 1958 is annexed hereto as Exhibit 15. Actual installation of the stock ticker was made by Western Union Telegraph Company on July 8, 1958. The Exchange billed MSC, INC. directly at an initial rate of $102.60 per month. All bills rendered were promptly paid.

Private wire connections to the trading desks of the above-mentioned firms were installed soon thereafter. Private wire connections were also made with Shumate & Co.; First Southwest Co.; Midland Securities Co.; Parker, Ford & Co. and Dallas Union Securities Company. None of these were member firms of the NYSE, but Dallas Union Securities Company became one in the latter part of 1958 or early 1959. The private wire connections, both with member and non-member firms, were installed between the office of MSC, INC. and the corporate securities trading departments of these firms located in Dallas.

[fol. 30] Once these connections were installed MSC, INC. was able to have virtually instantaneous communication with the corporate trading departments of the securities houses with which MSC, INC. had private wires. Merely by flicking the keys of the wire turret MSC, INC.'s trader was enabled to obtain and give requests for bid and offering price quotations and other market information. It was possible in a matter of seconds to obtain from each of the houses with which MSC, INC. was connected their quotations on over-the-counter corporate securities in which MSC, INC. was interested. Moreover, these houses could make similar requests for MSC, INC.'s quotations on particular issues. With these facilities MSC, INC. was able for its own account and for the account of its customers to buy particular corporate securities at the lowest quoted price and to sell securities at the highest quoted price. Moreover, through the direct wire connections and the almost instantaneous communication provided by these connections, MSC, INC. was enabled to keep in constant touch with the trend and fluctuations in particular issues.

For the period July, 1958 through February, 1959 the greatest portion of MSC, INC.'s transactions were in over-the-counter securities, primarily of local corporations. It actively traded such securities as the common stock of Ling Altec, Pan American Sulphur, Gulf Sulphur, Delhi-Taylor, Gulf Interstate Co., Canadian-Delhi, Midwestern Instruments, Dallas Oil, Levine's, Neiman-Marcus, Texas Industries, Electro Refractories, Jefferson Lake Petrochemicals, Vocaline, Texas Natural Gas, American Dryer, Baltimore Paint, Frito Co. and San Jacinto Petroleum.

During the period July, 1958 through September, 1959 MSC, INC. executed buy and sell orders for customers in securities listed on the New York Stock Exchange in a total volume of approximately $700,000.00. This was less than 3% of MSC, INC.'s total business for the same period. MSC, INC. received no commissions or fees of any kind [fol. 31] for this business, commissions being earned only by the member firm who executed such order at MSC, INC.'s request. When MSC, INC. took orders to buy or sell securities listed on the New York Stock Exchange it did so only as a customer accommodation or service.

In October, 1958 MSC, INC. made arrangements with Straus, Blosser & McDowell (a member firm of the NYSE) for a direct Western Union Telemeter connection to that firm's office in New York City. On October 13, 1958, Straus, Blosser & McDowell made letter application to the NYSE for permission to establish such connection. A copy of the letter application is annexed hereto as Exhibit 16. The Exchange approved this application on October 15, 1958, and the installation was completed soon thereafter. This telemeter (teletype) connection was used both by MSC, INC. and Straus, Blosser & McDowell for obtaining quotations on both listed and unlisted securities, creating markets in New York and Dallas on selected over-the-counter securities in which MSC, INC. and Straus, Blosser & McDowell were principally active and for general market and statistical information. After the establishment of this connection most customers' orders for the purchase and sale of listed securities (*i.e.*, listed on the NYSE) were handled over this wire and executed by Straus, Blosser & McDowell.

MSC, INC. started business with an original capitalization of $25,000. This sum was augmented shortly after it began activities by an additional $50,000 in the form of a subordinated loan from myself. I assured MSC, INC. that further capital would be contributed as needed. MSC, INC.'s activities were substantial and profitable. From June 12, 1958 (the date of incorporation) to April 30, 1959 MSC, INC. had a gross profit on trading transactions of $77,158.63 and net earnings before income tax of $17,280.12. In addition, it had an unrealized profit on securities in its portfolio in the amount of $28,927.82.

[fol. 32] Trading activities grew to such proportions that on December 1, 1958 Howard J. Speer was hired as an additional trader. Clerical personnel and sales representatives were also employed. Arrangements were made for the expansion of the Dallas Office, and on December 22, 1958, MSC, INC. entered into a lease for a new office in San Antonio for a one-year term commencing February 1, 1959 at an annual rental of $4,180.80. The San Antonio office was located in the National Bank of Commerce Building.

By February 1, 1959, MSC, INC. employed a total of 7 persons.

The Withdrawal of Private Wire Connections and Stock Ticker Service.

On February 12, 1959, without prior notice to me or anyone else connected with MSC or MSC, INC. a staff meeting of the Department of Member Firms of defendant, NYSE, was held in New York City. As I have subsequently learned through a deposition taken in this action, one of the items on the agenda of that meeting was the disapproval of MSC and MSC, INC.'s applications for private wire connections and MSC, INC.'s application for continuous stock quotation service. The decision to disapprove these applications was made at that meeting. On that day the NYSE sent letters to those of its member firms who were listed on the NYSE's records as having private wire connections with MSC, INC. stating in part:

> "Effective immediately, the Exchange has withdrawn the temporary approval granted your firm * * *. We would appreciate your advising us as soon as this wire has been discontinued."

Copies of the foregoing letters are annexed hereto as Exhibits 17, 18, 19, 20, 21, 22, 23, 24 and 25 (a), (b) and (c). [fol. 33] The first notice received by anyone in my organization of the NYSE's action came through a telephone call from a Mr. Bert Seligman of Straus, Blosser & McDowell. The telephone call was received by Mr. Reed on the morning of February 13, 1959. I was later told by Mr. Reed that Mr. Seligman had read him the letter he had received from the NYSE, after which he (Seligman) told Mr. Reed that in view of that letter, no more communications could be had between MSC, INC. and Straus, Blosser & McDowell over the private telemeter connection. Mr. Reed further apprised me that Mr. Seligman had offered to try to ascertain the reasons for the NYSE's action, but that later in the day Mr. Seligman informed Mr. Reed that while he had discussed the matter with officials of the Exchange they had refused to assign any reasons for their action. At about

noon of that same day a telephone call was received from the Dallas office of E. F. Hutton & Co., the caller reporting to Mr. Reed that they too had received a letter from the NYSE ordering discontinuance of MSC, INC.'s private wire connection with them.

On Monday morning, February 16, 1959, I contacted Mr. E. C. Gray, a vice president of the NYSE, in New York City, and was referred by him to a Mr. W. W. Coleman, a member of the staff of the NYSE's Department of Member Firms. I spoke to Mr. Coleman for about an hour but he would give me no reason for the NYSE's action. Annexed hereto as Exhibit 26 is a memorandum prepared by Mr. Coleman following our conversation. My recollection of this conversation is substantially in accord with the content of Mr. Coleman's memorandum, except I recall apprising him of my transactions with respect to the stock of U. S. Hoffman Machinery Co. in the supposition that a misunderstanding as to the nature of those transactions might have led the NYSE to take the action it did. However, it does not appear that the fact of my reference to transactions in U. S. Hoffman Machinery Co. stock is in any way material [fol. 34] to the instant motions for preliminary injunction and summary judgment.

During the week following my conversation with Mr. Coleman, all other private wire connections between MSC and MSC, INC. and NYSE member firms (except Dallas Union Securities Co., Inc.) were discontinued, whereupon these firms advised the NYSE of their compliance with the Exchange's action of February 12, 1959. Annexed hereto as Exhibits 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 are letters from these NYSE member firms advising the Exchange of the discontinuance of their respective wire connections with MSC and MSC, INC. (Dallas Union Securities Co., Inc., which I believe became an NYSE member-firm in late 1958 or early 1959, did not receive a communication from the NYSE respecting its wire connection with MSC, INC. until February 24, 1959. Annexed hereto as Exhibit 37 is the letter of February 24, 1959. In response to this letter, Dallas Union Securities Co., Inc. advised the NYSE by letter dated March 2, 1959, a copy of which is annexed

hereto as Exhibit 38, that its private wire connection with MSC, INC. had been disconnected.)

On February 16, 1959, MSC, INC. received a letter directly from the NYSE advising that its temporary approval for stock ticker service had been withdrawn and that service would be discontinued as of February 18, 1959. A copy of the NYSE's letter dated February 13, 1959 is annexed hereto as Exhibit 39. The stock ticker service was disconnected by Western Union Telegraph Company on February 18, 1959.

Parenthetically, it should be noted that in addition to the wire between MSC, INC. and Rauscher, Pierce & Co.'s corporate securities trading department MSC had a direct wire to Rauscher, Pierce & Co.'s municipal bond department. Accordingly, Mr. Walton of MSC telephoned Mr. Taylor Almon of Rauscher, Pierce & Co.'s municipal bond department and inquired whether the NYSE's letter directing the removal of the private wire connections referred not only to Rauscher, Pierce & Co.'s corporate securities trading department wire to MSC, INC. but to its municipal bond department wire to MSC as well. Mr. Walton was advised that John Rauscher, Jr. had specifically inquired about this matter and was informed by the NYSE that it applied to Rauscher, Pierce & Co.'s municipal bond department wire to MSC also.

[fol. 35]

On February 26, 1959 I addressed a letter to Mr. G. Keith Funston and Mr. Edward C. Werle, who are respectively President and Chairman of the Board of Governors of the NYSE. In that letter, a copy of which is annexed hereto as Exhibit 40, I requested "(1) Temporary reinstatement of the services, (2) that we be advised of the reasons for the action of the New York Stock Exchange, and (3) that we be given an opportunity to answer any charges and present whatever information you may require." I received a letter of response from Mr. Funston dated March 4, 1959 and a letter of response from Mr. Werle dated March 9, 1959. Both Mr. Funston and Mr. Werle declined to furnish any reason for the NYSE's action. Copies of these letters are annexed hereto as Exhibits 41 and 42 respectively.

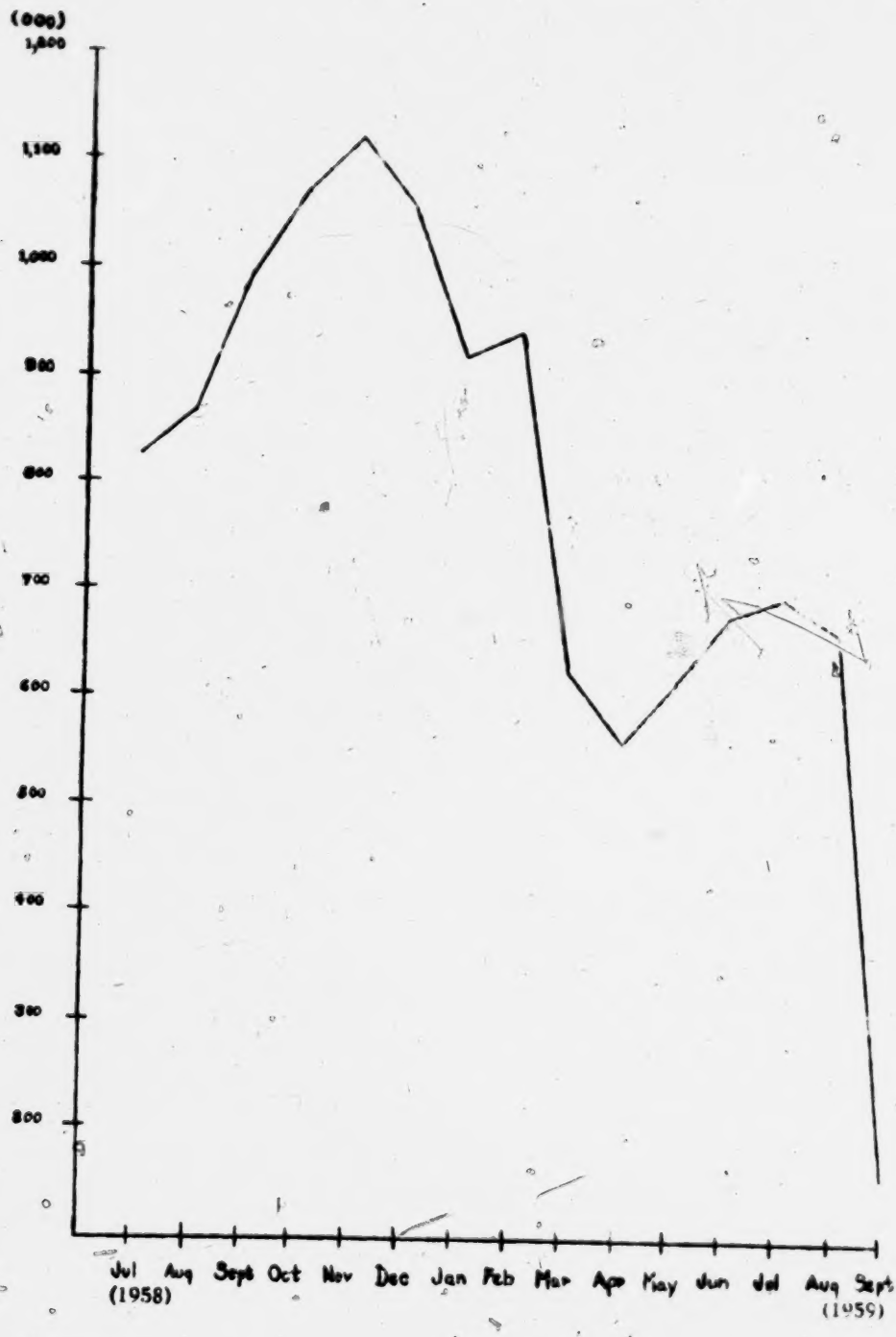
Meanwhile (following up on Mr. Coleman's suggestion that, if I determined to seek reconsideration, I support this request by qualitative letters of reference) I obtained letters of recommendation from Sanders & Company; Straus, Blosser & McDowell; Eppler, Guerin & Turner, Inc.; Rauscher, Pierce & Co., Inc.; Cady, Roberts & Company; Mercantile National Bank at Dallas; First National Bank in Dallas; Republic National Bank of Dallas; Texas Bank & Trust Company of Dallas; The Chase Manhattan Bank; Chemical Corn Exchange Bank and Bankers Trust Company. Copies of these letters are annexed hereto as Exhibits 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54. Eppler, Guerin & Turner, Inc. and Cady, Roberts & Co. originally [fol. 36] had filed letters of recommendation in support of the application of MSC, INC. for stock ticker service. I turned these letters over to Mr. Leon of the New York law firm of Leon, Weill & Mahoney and was subsequently advised that they had been exhibited to Mr. Frank J. Coyle, vice-president of the NYSE in charge of the Department of Member Firms, during the course of an interview on March 23, 1959.

The Effect and Consequences of Disapproval on MSC, INC.

As a result of the discontinuance of the private wire connections with the NYSE's member firms, MSC, INC. was unable to communicate rapidly with those securities houses in Dallas doing the bulk of the over-the-counter corporate securities business. While private wire connections to firms who were not NYSE members were not discontinued, those firms either had no corporate securities trading department or rarely traded in those securities actively traded in by MSC, INC. The corporation did attempt to communicate with the trading departments of these NYSE member firms in Dallas to obtain quotations and seek other information through conventional telephonic means, but this took an average time period measurable in minutes (rather than seconds, as in the case of a private wire).

This time differential placed MSC, INC. at a disadvantage in its trading activities, for while other firms heavily engaged in over-the-counter corporate securities trading could obtain information from one another almost instantaneously, MSC, INC. was relegated to a slower and secondary means of communication. In a rapid market movement, MSC, INC. could be and was the victim of information which, by the time it could be obtained and acted upon, was already obsolete and inaccurate. Moreover, trading [fol. 37] departments of the NYSE member firms would rarely attempt to contact MSC, INC. for price quotations on particular securities except for a very limited list of corporate securities in which, because of the size of MSC, INC.'s holdings, MSC, INC. was the principal "maker of the market".

Thus, MSC, INC. narrowed its trading activities to those few corporate stock issues over which it was able to maintain activity because of its position in those stocks. But even with respect to those issues, its ability to make a profit was substantially curtailed. The gross profits earned by MSC, INC. after February 13, 1959 were primarily from investment holdings of securities which remained in its portfolio for a substantial period of time. The number of MSC, INC. trading transactions in over-the-counter corporate securities was reduced to about 60% of its former volume and gross profits fell far below overhead. The sharp decline in MSC, INC.'s volume of trades in over-the-counter corporate securities after February 13, 1959 may readily be seen from the fact that in the seven months before February, 1959, MSC, INC.'s volume of trades in over-the-counter corporate securities was approximately $6,850,000, whereas in the seven months subsequent to February, 1959, this figure had shrunk to approximately $3,990,000. The foregoing is graphically demonstrated below: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[fol. 40] After February 13, 1959 salesmen employed by MSC, INC. began to leave its employ. Some of them felt that they would be tainted because of their association with a firm not approved by the NYSE. Others, that they would be unable to generate sufficient business because of the difficulties under which the corporation was operating. Efforts were made to hire new salesmen to replace those who were leaving the firm and to expand its retail sales of securities. These efforts proved futile, since prospective employees either had heard of MSC, INC.'s difficulties with the NYSE or refused to accept employment after being informed about them. Between March 1, 1959 and September 30, 1959, the corporation suffered a loss of $55,284.99 (exclusive of a long-term gain of $19,970.00 on sales of securities held for investment).

By September 15, 1959 all of MSC, INC.'s branch offices were closed. Mr. Reed resigned his position as of that date and the few remaining MSC, INC. employees were laid off as of September 30, 1959. By October 1, 1959, MSC, INC. ceased functioning as an operating business organization. All that remained was its corporate existence, gross unliquidated assets (other than cash) amounting to $63,406.22, and a net loss of $17,007.93.

The Effect and Consequences of Disapproval on MSC.

While MSC, the proprietorship, remains in existence, it too has been substantially damaged by the NYSE's action of February 12, 1959. Although municipal bond quotations are rarely subject to rapid price movements, there are occasions when news of the offer or withdrawal of tax-exempt securities has a substantial and immediate effect upon municipal bond prices and rapid communication facilities are then essential to trading activities. More important than this, however, is the business lost because NYSE firms having municipal bond departments, precluded from having [fol. 41] private wire connections because of the NYSE's disapproval action, found it more convenient to call other municipal bond dealers with whom they did have private wire connections whenever they sought to purchase or sell municipal bonds.

For example, in 1958, the total dollar amount of MSC's transactions was $54,607,729. In 1959, however, total dollar amount of MSC's transactions fell to $31,762,532. MSC's gross profits on securities transactions in 1958 was $306,603.19. For the same period in 1959, gross profits had dropped to $143,933.58. The adverse effects of the NYSE's action on MSC can be demonstrated in still another way. On February 13, 1959 MSC employed seventeen persons. By January 1, 1960 the number of MSC's employees had shrunk to seven.

The Reasons for the NYSE's Action.

The litigation was instituted April 6, 1959. Following the commencement of the action defendant served a notice to take my deposition and the deposition of my wife, Evelyn B. Silver, as secretary-treasurer of the corporate plaintiff. A motion was made to modify the notice of examination. In response to that motion defendant submitted the affidavit of Frank J. Coyle, vice president in charge of its Department of Member Firms. This affidavit, duly sworn to May 18, 1959, states that:

> "Information was received that during 1954, Mr. and Mrs. Silver, individually, and the Intercontinental Manufacturing Company, Inc. were the subjects of consideration under the industrial personnel security program of the Department of Defense, that Intercontinental had been engaged in the manufacture of aircraft parts and motors principally for the U. S. Government, that Intercontinental had lost its security clearance in April, 1954, that all Government contracts [fol. 42] were at that time withdrawn from Intercontinental, that Intercontinental was unable to establish business to replace that lost on Government contracts, and that Intercontinental was sold to U. S. Hoffman Corporation in 1955. That information, together with other information received by the Exchange during the course of the investigation, led the Exchange to believe that the temporary approval for the wire connections between the member firms and Municipal and the continuous ticker service should be discontinued."

The information that Mr. Coyle alleges was received by the NYSE is correct with respect to the denials of security clearance. However, I am informed by my attorneys that on June 29, 1959, the Supreme Court of the United States, in *Greene* v. *McElroy*, 360 U. S. 474, held that the Secretary of Defense and his subordinates had not been authorized to deny a defense contractor's employee access to his work, and thereby deprive him of his job on security grounds, in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination, and that as a result, the Defense Department's action, which apparently formed the basis of the NYSE's action here, was null and void.

The Need for Preliminary Injunctive Relief.

I have taken every step available to me in an effort to induce the NYSE to reverse its determination and to permit me to continue to engage in the corporate securities business personally or in a corporate form through plaintiff MSC, INC. I have vigorously sought to obtain the reasons for the NYSE's action in order to refute the information received by the Exchange and upon which it presumably based its action.

[fol. 43] In May, 1959 I attempted to finalize a correspondent advisory relationship with the firm of Delafield & Delafield, members of the New York Stock Exchange with offices in the City of New York, which had been under negotiation for some time. Under this relationship we would have been able to substantially increase our business and earnings. However, our negotiations were broken off due to the Exchange's action of February 12, 1959 and the fact that we were in litigation with the Exchange. Annexed hereto as Exhibit 55 is a letter from Delafield & Delafield dated May 21, 1959 terminating our discussions.

At about the same time Mr. Reed attempted to negotiate an arrangement with Eastern Securities Company of New York. Eastern Securities is a very large dealer in over-the-counter securities and is not a member of the New York Stock Exchange. However, it was reported to

me that Eastern Securities did not establish a direct wire connection with us because they had direct private wires to approximately sixty NYSE member-firms in the City of New York and did not wish to do anything to jeopardize their relationship either with those firms or the Exchange. At this time I do not know whether the decision of Eastern Securities Company was dictated by the Exchange or was the result of an individual decision on its part not to do business with me predicated upon my difficulties with the NYSE.

During this same period negotiations were held to acquire Midland Securities Co. of Orlando, Florida. Midland Securities is primarily a dealer in over-the-counter securities and has direct wire connections which it uses for the transaction of an over-the-counter business. My negotiations were conducted with a Mr. H. W. Bumpas as representative of Midland Securities. The negotiations seemed to be going satisfactorily and it appeared as if arrangements would be concluded. However, at that stage, Midland Securities announced that they could not enter [fol. 44] into any arrangement with us until our problems with the New York Stock Exchange had been resolved.

From February 13, 1959 the business of MSC, INC. and MSC steadily deteriorated. Efforts to stem this tide were unsuccessful in the case of MSC, INC. and by October, 1959 it ceased to exist as a functioning organization. Now, the only functioning organization is MSC, and it, too, will cease to exist unless the injunctive relief herein requested is granted by this Court. As previously pointed out, the NYSE's action not only reduced MSC's gross profits more than fifty per cent during 1959, but it caused a reduction in the total number of MSC's employees from seventeen on February 13, 1959 to seven by January 1, 1960. But this steady attrition of MSC's business and of its organization could be halted or deterred if NYSE member-firms are permitted to take independent action to restore or establish wire connections with MSC. Indeed, Exhibits numbered 17-25(c), 27-38, and 43-46 make it clear that NYSE firms would have continued to maintain their private wire connections with both MSC and MSC, INC., were it not for

the coercive effect that the NYSE's Constitution and Rules had upon their right of independent action. In fact, Walter Coleman, the assistant director of the NYSE's Department of Member Firms, during the course of the taking of his deposition in this proceeding, stated that no member firm had ever failed (during the seven to eight-year period of his recollection) to discontinue a private wire connection with a non-member firm after having been instructed by the NYSE to do so.

Conclusion.

I have exhausted every conceivable method of self-help in an effort to remain in the securities business. At every turn, my efforts have been frustrated by the February, 1959 action of the NYSE, and unless the NYSE's member firms are permitted to exercise their own independent [fol. 45] judgment to restore or refuse to restore their private wire connections, MSC will soon cease to exist as a functioning business. Because of the NYSE's Constitution and Rules, NYSE member firms are now unable to exercise their own independent judgment in this respect, and unless this Court takes immediate action to remove the continuing coercive effect of such Constitution and Rules upon them, the continuing irreparable injury caused MSC will soon result in a total and permanent destruction no money judgment can cure.

Harold J. Silver

Sworn to before me this 19th day of April, 1960. Eloise Masingill, Notary Public in and for Dallas County, Texas.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF HARRY F. REED

State of Texas,
County of Dallas, ss.:

Harry F. Reed, being duly sworn, deposes and says:

I was formerly employed as General Manager and trader by plaintiff Municipal Securities Company, Inc. and submit this affidavit in support of plaintiffs' several motions herein.

My first employment was with Remick, Hodges & Co. in 1926. I remained with that firm until 1938, serving in a [fol. 46] number of different capacities. My last position with that firm was assistant at the trading desk. From 1938 to 1940 I worked for Van Tuyl & Abbe as an assistant trader; from 1940 to 1943 as manager of the trading department of Hardy & Hardy; from 1944 to 1951 as assistant to the head of the unlisted trading department of Carl M. Loeb, Rhoades & Co.; from 1951 to 1955 as a trader at Dallas, Rupe & Co.; from 1955 to 1956 as a principal of Reed & Sloan and from 1956 to 1957 as a trader for Perkins & Co. From late 1957 through the spring of 1958 I was engaged in readying a new stock issue for public distribution. From June, 1958 until September, 1959 I was employed as Manager of the trading department of Municipal Securities Company, Inc., a corporation organized June 12, 1958.

One of my first duties with MSC, INC. was to establish a communications system. On June 13, 1958, acting in compliance with the NYSE Rules, I prepared for Mr. Silver's signature an application for wire connections with member firms and an accompanying information form. On June 23, 1958, I also prepared and submitted to the NYSE an "Agreement for Continuous Quotations of the New York Stock Exchange" (stock ticker service). On June 25, 1958 the Exchange issued its temporary approval for stock ticker service. On or about that date, it also gave approval for our private wire connections with member firms.

Stock ticker service commenced on July 8, 1958 and our private wire connections were installed during June and

July. The stock ticker service was of some value in keeping abreast of movements and trends in security prices generally. It was also desirable to have stock ticker service as a customer accommodation, for although we made no commission from customer orders on listed securities, we believed that the ticker service would attract customers and we would derive profits from their over-the-counter transactions. And by the end of July, MSC, INC. was established with complete trading facilities.

[fol. 47] The importance of private wire connections in the over-the-counter securities market can best be illustrated by comparing the wire system to the floor of a national exchange. The market, *i.e.*, the bid and asked price on a listed security, is established through floor traders at an exchange. Similarly, the market in an unlisted security is established by traders, who although they do not have face to face contact, are almost simultaneously in communication with one another through private wire facilities. An individual can purchase and sell securities with no more guide than the evening newspaper. But to engage in securities trading as a business, one's facilities and information must be as good as his competitor's. When profit or loss is measured in eighths of a point, delays in communication can be fatal.

The private wire system established by MSC, INC. was typical for medium size firms in the over-the-counter securities business. We had direct wires to the Dallas offices of Rauscher, Pierce & Co.; Dallas, Rupe & Son; Schneider, Bernet & Hickman; Eppler, Guerin & Turner; Merrill Lynch, Pierce, Fenner & Smith; Sanders & Co.; Dallas Union Securities Co.; Goodbody & Co.; Harris Upham & Co.; and E. F. Hutton & Co., all of whom were or became member firms of the NYSE. Through these links we were also able to obtain quotations from firms with whom they had private wire facilities. Schneider, Bernet & Hickman had a direct private line to G. A. Saxton Co.; Dallas Union Securities had a direct private line to Troster, Singer & Co.; and Dallas, Rupe & Son maintained a direct line to Singer, Bean & Mackie. These three firms, located in the City of New York, are large over-the-counter trading houses. Their trading markets were made quickly avail-

able to us by our direct line to their Dallas correspondents. And most pertinent, these three firms dealt in every over-the-counter security handled by MSC, INC.

In October, 1958, we established a direct Western Union Telemeter connection with the New York City office of [fol. 48] Straus, Blosser & McDowell, a member firm of the NYSE. This wire was used primarily to create markets in New York and Dallas on certain over-the-counter securities traded by our respective firms. Straus, Blosser & McDowell paid for the entire cost of this wire, and we orally undertook to guarantee them a minimum of $1,000 a month in commissions on listed securities business. Parenthetically, MSC, INC. made no profit on listed securities transactions executed for our customers. This business was handled by us strictly as a customer accommodation, and all commissions went to the member firm through which we placed the order.

In addition to private wire connections with NYSE member firms, MSC, INC. had direct wire connections with the Dallas office of Shumate & Co.; First Southwest Co.; Parker, Ford & Co.; and Midland Securities Co. We did a moderate amount of business with the first three. Midland Securities Co. was not engaged in trading and maintained a wire to us principally for quotation service. Our direct wire network as of February 1, 1959 is graphically set forth in Exhibit 56, annexed hereto. Thus equipped, we were in a position to do a substantial business. Our largest activity, and from which we derived most of our income, was in trading for own account. We specialized in a selected list of over-the-counter securities, most of which were issued by corporations doing business in Texas.

In the first six months of operations, July-December, 1958, we had a total trading volume of approximately $6,000,000 in over-the-counter securities and about $2,500,000 in listed securities. Some income was derived from retail transactions with customers, but this accounted for a relatively small portion of the total although we were in the process of building a sales organization to increase this phase of our business. By January 1, 1959, we had two commissioned salesmen on our payroll and operated a branch office in San Antonio jointly with MSC. On January

1, 1959, we had seven fulltime employees and were anticipating further expansion.

[fol. 49] On February 13, 1959, shortly after the commencement of trading that day, I received a long distance telephone call from Mr. Bert Seligman of Straus, Blosser & McDowell. Mr. Seligman read me a letter he had just received from the NYSE advising that the Exchange had withdrawn its prior temporary approval for our private telemeter wire. I expressed my dismay and said that I did not know of any reason which could have prompted this action. Mr. Seligman said he would make inquiries on our behalf, but under the circumstances and until the matter was cleared up, we could have no further communications over the telemeter wire. I immediately told Mr. Silver of my conversation with Mr. Seligman. Sometime later in the day, Mr. Seligman telephoned me to report that he had spoken to a Mr. Coleman at the NYSE's Department of Member Firms, but Mr. Coleman would give him no reason for the NYSE's action. During the course of the day we also spoke to Fred Opitz of Cady, Roberts & Co. in New York City and John Rauscher, Jr. of Rauscher, Pierce & Co. in Dallas, both of whom undertook to make inquiries. However, they later reported that they could not obtain the reasons for the Exchange's action—they had been denied any information beyond the bare contents of the letter of disapproval.

During the following week we received telephone calls from all the NYSE member firms with whom we had established private wire connections. They all stated that they had received letters directing them to discontinue their wire connections with us and that all further communications over these wires would be stopped.

At first, we did not know whether the NYSE's order of discontinuance applied to the wires between MSC (the proprietorship) and the municipal bond departments at Merrill Lynch, Pierce, Fenner & Smith; Rauscher, Pierce & Co.; and Dallas Union Securities Co. MSC had never filed an application for these connections, and I am informed that these firms had never sought NYSE approval for such wires [fol. 50] or notified the NYSE of their existence. MSC's wires were used for municipal bond quotations and transac-

tions and were not used by MSC, INC. for corporate securities transactions. MSC, INC. had its own direct wires to each of these firms. I discussed this question with both Mr. Silver and D. Edward Walton, Manager of MSC and a Vice President of MSC, INC. I later learned that the Exchange considered its disapproval order to apply to MSC's wires also. Despite the fact that these member firms had not initially sought NYSE approval for establishing private wire connections with MSC, they nevertheless discontinued these connections when the NYSE directed them to do so.

On February 16, 1959, MSC, INC. received a letter from the NYSE advising that the stock ticker service would be discontinued. Two days later representatives of the Western Union Telegraph Company removed the equipment.

During the following months we tried to devise methods of operation which might permit us to remain in business without direct wires to NYSE member firms. The NYSE's action deprived us of most of our communications network. This may be seen from Exhibit 56. Instead of obtaining quotations in a matter of seconds over direct wires, we were relegated to conventional telephones. We would dial the number of the member firm from whom we wanted a quotation, reach the switchboard operator at its office, ask to be connected with its trading department, sometimes have to wait because the trading department extensions were busy, and finally reach a trader. We searched for ways to speed up this process and installed an automatic dialing system. This eliminated the time lapse in manual dialing, but the total time saved was nominal.

Traders at member firms who wished to contact us for our quotations also were required to use the regular telephone. Of course, they could rapidly communicate with one another, or with non-member firms with whom they had [fol. 51] direct wire connections. As a result, we received fewer and fewer inquiries. Generally speaking, the only inquiries we received related to specific stock issues in which our activities were so large that we were the principal "makers of the market."

Our competitors had a very substantial advantage in trading with us, because we lacked quick access to quotations and information. We were soon compelled to curtail our trading activities in the over-the-counter market to a very limited number of issues. However, even in those issues in which we played a substantial role in creating the market, our profits were diminished because we lacked efficient communications.

In order to be close to a source of quotations, I began to spend the better part of each trading day in the customer rooms of NYSE member firms. I sat in the board rooms and viewed the projected ticker tape in an attempt to keep abreast of current market developments. However, because I was not in my own office, I was unable to communicate with other trading houses, and was unavailable to customers who might be seeking MSC, INC.'s quotations.

The number of consummated transactions in over-the-counter securities (*i.e.*, actual purchases or sales), with member firms with whom we previously had direct wire connections declined precipitously. This is graphically demonstrated by Exhibit 57. Transactions with Dallas Union Securities Co. are omitted, for it was a member firm only during a part of the period represented. The other firms are shown, both including and excluding Rauscher, Pierce & Co. A comparison of the number of principal transactions with each of these companies individually, both in over-the-counter and listed securities, is set forth in Exhibit 58.

Curiously enough, while the NYSE's disapproval action curtailed our transactions in over-the-counter securities, our transactions in listed securities showed a sharp increase. [fol. 52] Indeed, I was hopeful that the profits lost by the cut-back in over-the-counter activities could be made up by trading activities in listed stocks. The following chart sets forth a comparison of the dollar volume of MSC, INC. transactions as principal in over-the-counter and listed securities.

Month	$ Trading Volume (000 omitted) Over-the-Counter	Listed
July '58	827	154
Aug.	866	207
Sept.	997	185
Oct.	1,077	452
Nov.	1,111	579
Dec.	1,060	870
Jan. '59	920	659
Feb.	941	425
March	627	531
April	559	1,048
May	617	1,221
June	679	1,535
July	692	1,597
Aug.	661	650
Sept.	155	69

In the months of August and September, 1959 we were in the process of liquidating our holdings preparatory to going out of business. The comparative trading volume for the period of July, 1958 to July, 1959 is set forth graphically in Exhibit 59.

Our trading activities in listed securities failed to make up for our loss of profitable over-the-counter business. As shown below, our total dollar volume of principal transactions actually increased after February 13, 1959.

Six Month Period from:	Volume OTC	Listed	(000 Omitted) Total
Aug. '58-Jan. '59	$6,031	$2,952	$ 8,983
March '59-Aug. '59	3,835	6,582	10,417

[fol. 53] Despite this increase in dollar volume in the six month period of March, 1959 through August, 1959, we had a net loss of $21,595. In the earlier six month period (August, 1958 through January, 1959) we had a net profit of $17,622.

Placing our trading emphasis on listed rather than over-the-counter securities posed the following disadvantages: (1) when we traded over-the-counter securities we rarely paid commissions (transactions in listed securities were subject to broker's commissions); (2) over-the-coun-

ter securities are generally quoted on two bases, a dealer to dealer price (the inside market) and a price to the public (the outside market) (but there is no price differential on listed securities); (3) our trading activities in over-the-counter securities were firmly grounded on close personal study and constant attention to the affairs of the companies whose stock we traded (when we traded listed securities, the information we relied on was available to anyone).

The change from a profitable operation to a losing one was caused solely by our inability to maintain effectively our over-the-counter trading profits. It had nothing to do with market fluctuations. In the securities trading business it is a truism that profits can be made in a declining market to the same extent as in a rising one. In fact, the market continued to rise during all the time we were in business. The Standard & Poor's 500 Stock Indices for this period were as follows:

Month	Index
Aug. '58	51
Sept.	52
Oct.	54
Nov.	56
Dec.	58
Jan. '59	59
Feb.	58
Mar.	60
Apr.	62
[fol. 54]	
May	63
June	64
July	65
Aug.	63

During the period in which we earned $17,622 the market was rising. During the later period in which we lost $21,595, the market was still rising.

In our efforts to develop profitable lines of business to compensate for the loss of trading profits, we attempted to expand our retail customer business in over-the-counter securities. By intensive effort we were able to develop a slight increase in the volume of such business (from $1,213,000 in the six month period before February, 1959

to $1,396,000 in the six month period after February, 1959). However, our attempts to bring about a substantial increase in this phase of our business were frustrated by our inability to hire salesmen. In the spring and summer of 1959 I tried to recruit three qualified salesmen. Two of these men knew about our problem with the NYSE and were not interested in coming to work for us until this problem was resolved. The third man was not aware of the NYSE's action, but when I told him the facts, he lost all interest in employment by our firm.

By the late summer of 1959, we all recognized that MSC, INC. could not survive the blow sustained by the loss of its private wire connections with NYSE member firms. Our dollar losses began to mount. In August, 1959, we sustained a net loss of over $38,000. On or about September 15, 1959, I tendered my resignation and went off the payroll. I remained on the job until the end of September to assist in the liquidation of assets. On September 30, 1959 the last of MSC, INC.'s employees were laid off. Our net loss for September was $13,720. A business which had grown to substantial proportions in the seven and a [fol. 55] half months prior to February 13, 1959 had just as rapidly declined in the seven and a half months following February 13, 1959.

Harry F. Reed

Sworn to before me this 20th day of April, 1960. Eloise Masingill, Notary Public in and for Dallas County, Texas.

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 4

APPLICATION FOR PRIVATE WIRE CONNECTION.

June 13, 1958.

TO THE NEW YORK STOCK EXCHANGE:

We hereby apply for approval of the establishment and maintenance of a wire connection with a member firm (or member corporation) of the New York Stock Exchange, by means of which we may obtain continuous quotations of

the New York Stock Exchange, and we represent and agree with you that:

1. The name under which business of applicant is conducted is Municipal Securities Company, Inc.

   The business of applicant is General Securities Dealer.

   The place at which the private wire is to be installed is 600 First National Bank Building, Dallas 2, Texas.

   The member firm (or member corporation) with which the private wire will be connected is: See list attached.

   (Attach list, if more than one private wire connection is being applied for.)

[fol. 56]

2. Written notice will be given to the New York Stock Exchange (hereinafter called the Exchange) of any change of name, nature or place of business at which the private wire is in operation.

3. We are not engaged in, and will not engage in, the operation of any illegal business and we will not use, or permit anyone else to use, the quotations of the Exchange, or any of them, for any illegal purpose.

4. The continuous quotations of the Exchange received by us are for our individual use in our business at the places set forth above. We will not furnish said continuous quotations, nor will we permit said continuous quotations to be furnished by others, to any other person, firm or corporation, nor to any other office or place, except to a branch office of ours.

   If the undersigned shall furnish, or permit to be furnished, said continuous quotations to any person, firm or corporation without the approval of the Exchange, we agree that the Exchange may sue the person, firm or corporation to whom said continuous quotations are thus furnished to prevent the receipt or use thereof by said person, firm or corporation without making us a defendant in such suit.

5. We will comply with any requirements of the Exchange respecting the location in our place or places of business

of our blackboards, tickers, telephones and instrumentalities, and will adopt and enforce, as respects persons entering our said place or places of business, any regulation which the Exchange may deem it advisable to insist upon in order to prevent said continuous quotations from being improperly taken from any of our offices or places of business.

At all reasonable times any person designated by you shall have access to our offices, and the right to observe [fol. 57] the use made of said quotations, and to examine and inspect all instruments and apparatus used in connection with the said service and that at all reasonable times any person designated by you shall have access to and the right to examine and inspect all our books, papers and records.

6. The said wire or other connections and the furnishing of said quotations to us shall be discontinued whenever you shall withdraw approval thereof.

7. You shall not be pecuniarily liable for the accuracy of any quotations furnished to us nor for any delays, errors or omissions in said quotations, nor for any damages occasioned thereby.

8. Sales prices and or bid and asked quotations of any stock, bond or other security at intervals of fifteen (15) minutes or less shall be deemed to be continuous quotations within the meaning of this agreement.

9. All reports to our customers on transactions in securities listed on the New York Stock Exchange shall clearly show whether we are acting as agent or principal and reports on transactions in such securities in which we act as agent shall show:

(a) The security bought or sold;

(b) The name of the securities market on which the transaction was made;

(c) The actual price paid for it, or received for it, on such market;

(d) An offer to furnish, upon the written request of the customer, the name of the firm or corporation through whom the deal was executed;

(e) The commission charged by said firm or corporation to us;

[fol. 58]

(f) The commission, if any, charged to the customer by us.

MUNICIPAL SECURITIES COMPANY, INC.

.....

(Name of Applicant)

.....

(Authorized signature)

HAROLD J. SILVER, PRESIDENT

.....

(Name and title of individual signing)

ANSWER TO QUESTION 1, PART 4

Rauscher, Pierce & Co.	Dallas
Dallas, Rupe & Son	"
Eppler, Guerin & Turner	"
Merrill Lynch, Pierce, Fenner & Smith	"
Sanders & Co.	"
Harris Upham & Co.	"
Goodbody & Co.	"
E. F. Hutton & Co.	"
Schneider, Barnet & Hickman	"

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 5

NEW YORK STOCK EXCHANGE
Department of Member Firms
11 Wall Street

INFORMATION TO BE FURNISHED BY NON-MEMBER FOR PRIVATE WIRE CONNECTIONS OR TICKER SERVICE

(Use separate sheets wherever necessary)

1. Name (full and exact title of firm or individual)
Municipal Securities Company, Inc.

2. Address 600 First National Bank Building, Dallas 2, Texas

3. If incorporated, indicate where Texas

4. Description of business General Securities Dealer

[fol. 59] 5. List Exchange Memberships None

6. Indicate whether registered as follows:

(a) With S. E. C. as broker-dealer
Application filed

Yes No

(b) With S. E. C. as investment company

Yes No

(c) With S. E. C. as investment adviser

Yes No

(d) With Securities Department of any State
(indicate what states)
Application Filed—Texas

Yes No

7. Full name, title and home address of each of the principals, officers or partners, whether general or limited
Harold J. Silver, President, 6815 Hunters Glen Rd., Dallas, Texas

D. Edward Walton, Vice President, 3132 Hanover, Dallas, Texas
Evelyn B. Silver, Secretary-Treasurer, 6815 Hunters Glen Rd., Dallas, Texas

8. If a corporation, list below full name and address of each director
Harold J. Silver, President — Address as above
D. Edward Walton, Vice President — "
Evelyn B. Silver, Secretary-Treasurer — "

9. Outline on separate sheet the business history of each of the individuals mentioned in 7 and 8.

10. Date of latest balance sheet or audit and approximate net working capital as shown thereon
June 13, 1958 $25,000.00

11. Banking connections First National Bank in Dallas, Dallas, Texas

June 13, 1958

.....
(Signature)

HAROLD J. SILVER, President

.....
(Title)

[fol. 60]

BUSINESS HISTORY—10 YEAR

From	To	Company	Position
RE: Harold J. Silver			
3-48	5-55	Intercontinental Mfg. Co., Inc. Garland, Texas	Pres. & Gen'l. Mgr.
8-55	9-56	Intercontinental Securities Company, Meadows Building, Dallas, Texas	Owner
9-56	Date	Municipal Securities Company (Approx.) 600 First National Bank Building, Dallas 2, Texas	Owner
RE: D. Edward Walton			
1-46	1-50	Fort Worth National Bank, Fort Worth, Texas	Ass't. Mgr. Bond Dept.
1-50	11-50	Wm. N. Edwards & Co. Fort Worth, Texas	West Tex. Rep.
9-51	1-52	Wm. N. Edwards & Co.	West Tex. Rep.
1-52	9-55	Fort Worth National Bank	Mgr. Bond Dept.
9-55	3-56	Russ & Company, Houston, Texas	Resident Mgr.
3-56	9-56	Moroney, Belsener & Co. Houston, Texas	V. P. & Mgr. Municipal Dept.
9-56	Present	Municipal Securities Company, Dallas, Texas	Manager
RE: Evelyn B. Silver			
3-48	5-55	Intercontinental Mfg. Co., Inc. Garland, Texas (Also Attorney—New York Bar)	Treas. & Ass't. Gen'l. Mgr.
5-55	to date	Attorney (New York Bar) 400 Madison Ave., N. Y., N. Y.	Self

[fol. 61]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 6

E. F. HUTTON & COMPANY
Members New York Stock Exchange
Sixty One Broadway
New York 6, N. Y.
WHitehall 4-2100

June 2, 1958

New York Stock Exchange
Department of Member Firms
11 Wall Street
New York, N. Y.

Dear Sirs:

Attn: Mr. Platow

We would ask your permission to install a private telephone connection from our Dallas, Texas office to the offices of:

Shumate & Co.
524 First Nat'l Bk. Bldg.
Dallas, Texas

and

Municipal Securities Co.
600 First Nat'l Bk. Bldg.
Dallas, Texas

They are members of the National Association of Securities Dealers and have lines to other member firms.

Very truly yours,

AS/ms

[fol. 62]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 7

DALLAS RUPE & SON, INC.
Republic National Bank Building
Dallas 1, Texas

June 2, 1958

Mr. Arthur F. Platow
Division of Commissions and Quotations,
New York Stock Exchange
11 Wall Street
New York 5, New York

Re: *Private Wire Connection*
Municipal Securities Company, Inc.

Dear Mr. Platow:

We wish to have installed a private wire connection between our trading department and the office of Municipal Securities Company, First National Bank Building, this city.

Will you place send us a set of the forms for execution by Municipal Securities Company?

Very truly yours,

RBT:rp

[fol. 63]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 11

[Letters of similar import, plaintiffs' exhibits 6-10, 12, 13 and 16, were received by defendant from other member firms or corporations.]

SCHNEIDER, BERNET & HICKMAN, INC.
Members New York Stock Exchange
Investment Securities

1505 Elm
Dallas 1, Texas
RIverside 8-1201

June 24, 1958

MR. ARTHUR F. PLATOW
Department of Member Firms
New York Stock Exchange
11 Wall Street
New York 5, New York

Dear Mr. Platow:

We respectfully request your approval of a private wire connection between our firm and Municipal Securities Company, Inc., 600 First National Bank Building, Dallas, Texas.

Yours very truly,

s/ A. E. BERNET, JR.,
SCHNEIDER, BERNET & HICKMAN, INC.

AEBjr:lqs

[fol. 64]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 14

AGREEMENT FOR CONTINUOUS QUOTATIONS OF THE NEW YORK STOCK EXCHANGE

June 23, 1958

TO THE NEW YORK STOCK EXCHANGE:

We hereby apply for a service of continuous quotations of the New York Stock Exchange and we represent and agree with you that:

1. The name under which business of applicant is conducted is Municipal Securities Company, Inc.
   The business of applicant is General Securities Business.
   The place at which service is to be furnished is 600 First National Bank Bldg., Dallas, Texas.
   (If service at more than one place is desired, attach schedule on separate sheet)
   The principal office of applicant (to which service will be billed) is same.
   The type of service applied for is 1-Stock Service, Present Charge: $95.00 a month. (Indicate whether stock or bond.)

2. Written notice will be given to the New York Stock Exchange (hereinafter called the Exchange) of any change of name, nature, or place of business at which continuous quotations are received by us from you.

3. We are not engaged in, and will not engage in, the operation of an illegal business and we will not use, or permit anyone else to use, the quotations of the Exchange, or any of them, for any illegal purpose.

[fol. 65] 4. The continuous quotations of the Exchange received by us are for our individual use in our business at the places set forth above. We will not furnish said

continuous quotations, nor will we permit said continuous quotations to be furnished by others, to any other person, firm or corporation, nor to any other office or place, except to a branch office of ours. But the foregoing shall not preclude a member firm or member corporation of the Exchange from furnishing said continuous quotations to a member or non-member with whom, with the approval of the Exchange, a private wire connection is maintained.

If the undersigned shall furnish, or permit to be furnished, said continuous quotations to any person, firm or corporation without the approval of the Exchange, we agree that the Exchange may sue the person, firm or corporation to whom said quotations are thus furnished to prevent the receipt or use thereof by said person, firm or corporation without making us a defendant in such suit.

We recognize that the privilege of furnishing quotations to our branch offices and to wire correspondents of members as outlined above does not include the right to furnish a complete service as to all quotations, and we agree that we will, at the request of the Exchange, limit the number and frequency of the quotations so furnished.

5. We will not attach or cause or permit to be attached to, or use or cause to be used in connection with, the wires, apparatus or equipment by which the said continuous quotations are received by us, any device or apparatus not approved by the Exchange.

6. We will comply with any requirements of the Exchange respecting the location in our place or places of business of our blackboards, tickers, telephones and instrumentalities, and will adopt and enforce, as respects [fol. 66] persons entering our said place or places of business, any regulation which the Exchange may deem it advisable to insist upon in order to prevent said continuous quotations from being improperly taken from any of our offices or places of business. At any and all times any person or persons designated by the Ex-

change shall have access to the office or place where said continuous quotations are received by us, and the right to observe the use made of said continuous quotations, and to examine and inspect all instruments and apparatus used in connection therewith in said office or place.

7. We will pay to the Exchange in advance the monthly charge from time to time fixed by the Exchange for said continuous quotations, plus any applicable federal, state or local taxes, and charges for additional equipment, installation, changes of location, removal, etc.

8. A strict compliance with the above provisions is and shall be a condition precedent to our right to continue to receive said continuous quotations and the Exchange may, with or without notice, forthwith discontinue said service whenever in its judgment there shall have been any breach of the foregoing agreements, or any of them.

9. The Exchange does not guarantee the sequence, accuracy or completeness of any of the quotations or market information of the Exchange. The Exchange shall not be liable in any way to us or to any other person, firm or corporation whatsoever for any delays, inaccuracies, errors in, or omissions of, any quotations and market information or the transmission thereof, or for any damages arising therefrom or occasioned thereby or by reason of non-performance or interruption of quotations for any cause whatever.

10. Sales prices and/or bid and asked quotations of any stock, bond or other security at intervals of fifteen (15) [fol. 67] minutes or less shall be deemed to be continuous quotations within the meaning of this agreement.

11. The furnishing of continuous quotations to us by you at any location shall continue in force until the expiration of thirty (30) days after written notice shall have been given by us to the Exchange or by the Exchange to us of an intention to terminate the same, unless

sooner terminated by the Exchange as provided in Clause 8 above.

12. This agreement shall continue in force and effect so long as continuous quotations of the Exchange are received by us at any office or place.

MUNICIPAL SECURITIES COMPANY, INC.
(name of applicant)

s/ HAROLD J. SILVER
(Authorized signature)

HAROLD J. SILVER
President
(Name and title of individual signing)

ACCEPTED:

New York Stock Exchange

By .....

Dated at New York, N. Y., ... 19.... .

PLEASE SIGN AND RETURN ORIGINAL AND DUPLICATE TO NEW YORK STOCK EXCHANGE, 11 WALL ST., NEW YORK, N. Y.

[fol. 68]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 15

NEW YORK STOCK EXCHANGE
Ticker-Quotation Department
Eleven Wall Street
New York 5, N. Y.

June 25, 1958

Mr. Harry Reed
Municipal Securities Co., Inc.
600 First National Bank Building
Dallas, Texas

Dear Mr. Reed:

We are pleased to advise you that your application for continuous stock quotations service has been temporarily approved, pending further processing, and that we have issued our order to the Western Union Telegraph Company to install a stock ticker, associated with a Trans-Lux projector, in your office at the above address. We have requested Western Union to complete this installation as soon as possible which, under normal circumstances, will be in approximately two weeks.

Very truly yours,

[fol. 69]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 16

STRAUS, BLOSSER & MCDOWELL
Investment Securities
39 South LaSalle Street
Chicago 8, Ill.

ANdover 3-5700

111 Broadway
New York City
October 13, 1958

New York Stock Exchange
Department of Member Firms
11 Wall Street
New York City

Attention: Mr. Harold Shutz

Dear Mr. Shutz:

We hereby request permission to install a private wire over Western Union facilities to the Municipal Securities Company, Inc., 600 First National Bank Building, Dallas 2, Texas.

Very truly yours,

.....

B. J. Sinclair

[fol. 70]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 17

[Similar letters, plaintiffs' exhibits 18-25A and 37, were sent by defendant to other member firms or corporations.]

February 12, 1959

Messrs. Straus, Blosser & McDowell
111 Broadway
New York, New York

Attention: Mr. B. J. Sinclair

Gentlemen:

This is in reference to your application for a private wire connection with Municipal Securities Company, Inc., 600 First National Bank Building, Dallas, Texas.

Effective immediately, the Exchange has withdrawn the temporary approval granted your firm on October 15, 1958.

We would appreciate your advising us as soon as this wire has been discontinued.

Very truly yours,

ARTHUR F. PLATOW
Assistant Manager

[fol. 71]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 25A

February 12, 1959

Schneider, Bernet & Hickman, Inc.
1505 Elm Street
Dallas 1, Texas

Attention: Mr. A. E. Bernet, Jr.

Gentlemen:

This is in reference to your application for a private wire connection with Municipal Securities Company, Inc., 600 First National Bank Building, Dallas, Texas.

Effective immediately, the Exchange has withdrawn the temporary approval granted your firm on June 26, 1958.

We would appreciate your advising us as soon as this wire has been discontinued.

Very truly yours,

ARTHUR F. PLATOW
Assistant Manager

[fol. 72]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 25B

SCHNEIDER, BERNET & HICKMAN, INC.
Member, New York Stock Exchange
Investment Securities

February 16, 1959

New York Stock Exchange
Department of Member Firms
11 Wall Street
New York, N. Y.

Attention: Mr. Arthur F. Platow

Gentlemen:

A direct private wire to the Municipal Securities Company, Inc., 600 First National Bank Building, Dallas, Texas, is operating at the present time, as is a private wire to most of the other members of the N.A.S.D. in Dallas.

Please tell us what is necessary to get your approval for this connection.

Thank you very much.

Most sincerely,

W. L. JACK NELSON

[fol. 73]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 25C

February 18, 1959

Schneider, Bernet & Hickman, Inc.
1505 Elm Street
Dallas 1, Texas

Attention: Mr. W. L. Jack Nelson

Gentlemen:

Thank you for your letter of February 16, 1959, regarding the private wire connection to Municipal Securities Company, Inc., of Dallas, Texas.

Please refer to our letter of February 12, 1959, in which we advised that the temporary approval, previously granted your firm, has been withdrawn.

When the Exchange withdraws approval of a private wire, it effects all member firms of the New York Stock Exchange and does not have any bearing on non-member firms who may be members of the N.A.S.D.

We would appreciate your advising us as soon as this wire has been discontinued.

Very truly yours,

ARTHUR F. PLATOW
Assistant Manager

[fol. 74]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 26

MEMORANDUM.

Municipal Securities Co., Inc.
Harold J. Silver

February 16, 1959

Harold J. Silver, President of Municipal Securities Co., Inc., telephoned to Mr. E. C. Gray on 1/16/59, said he was in New York City, and wanted to talk to someone about our recent withdrawal of wire and ticker facilities. Mr. Gray referred him to me.

Mr. Silver came in and spent almost an hour talking to me. At the beginning of our conversation, I explained to him the long standing policy of the Exchange about not giving reasons for any disapproval or withdrawal of approval action.

He told me, in substance, that his reputation has always been of the best and that while he has made some business enemies as he has gone along, he feels that he has no more than the average person. He said he could think of no reason whatever, either personal, with respect to any of the officers or personnel, or with respect to the corporation itself, why the Exchange should feel it necessary to withdraw approval of a private wire and ticker.

He said that he had done some soul-searching and could not come up with any answer.

He asked whether, within the limits of our policies, I could be of any help to him.

I explained that he was at liberty to request reconsideration and I told him that if I were in his position, and if I determined to ask for reconsideration, I would support that request with qualitative letters of reference from friends, present and former business associates, present and former employees or employers, regulatory or supervisory authorities, etc., in respect of his entire organization, including officers and personnel.

[fol. 75] He asked whether legal assistance would avail him anything. I told him he was at liberty to employ legal assistance, of course, and that if he contemplated bringing legal action, such legal assistance might or might not prove to be of real help. I pointed out that, on the other hand, if he merely wishes the Exchange to review its action, there was very little in my opinion which legal assistance could offer to him.

He said that he does want to pursue the matter, but he has no desire to institute any legal action.

He asked whether it might expedite matters if he were to try a process of elimination in order to find out the reasons for the Exchange's recent action. For example, he suggested that he might disband his entire organization and just make application as an individual. If that were disapproved, he would know that he himself was an undesirable person as far as the Exchange was concerned, even though there might be other undesirables connected with his organization. If we approved tickers and wires, for him as an individual, he then would add officers or personnel one at a time, and "wait to see if anything happened" as far as the Exchange is concerned. He asked whether the Exchange would look with favor upon such a procedure, and I told him in my personal opinion the reaction would be unfavorable.

He said that the other alternative was to do a lot of leg work and paper work in the line of character references, and he felt that this was an almost futile task. However, he indicated that he would follow through along these lines.

He expressed great appreciation of my courtesy and "helpfulness."

I told him that if and when he does decide to ask for reconsideration he could do so either in person before staff of this Department or by letter. In either event, I suggested that he support such request with documentation.

WALTER COLEMAN.

[fol. 76]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 34

[Letters of similar import, plaintiffs' exhibits 27-33, 35, 36 and 38, were received by defendant from other member firms or corporations.]

RAUSCHER, PIERCE & CO., INC.
Mercantile Dallas Building
Dallas 1, Texas
RIverside 1-9033

February 17, 1959

New York Stock Exchange
11 Wall Street
New York 5, New York

Atten: Mr. Arthur F. Platow
Department of Member Firms

Gentlemen:

This is to advise that in compliance with your letter of February 12, 1959, we have ordered the private wire connection with Municipal Securities Co., Inc., 600 First National Bank Bldg., Dallas, Texas, discontinued effective immediately.

Very truly yours,

JOHN H. RAUSCHER, JR.,
Vice President.

[fol. 77]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 39

NEW YORK STOCK EXCHANGE
Eleven Wall Street
New York 5, N. Y.

February 13, 1959

Mr. Harry Reed
Municipal Securities Co.
600 First National Bank Bldg.
Dallas, Texas

Dear Mr. Reed:

As you know, temporary approval for the stock ticker installation in your office was given pending our customary investigation. Our processing of your application is now completed and, I wish to assure you, it was very carefully considered. We regret that we must tell you that your application has been disapproved and that the temporary approval previously given has been withdrawn.

Our order to The Western Union Telegraph Company to disconnect the ticker has been issued. The discontinuance of the service, and our billing therefor, will be effective after the close of business, February 18, 1959.

Very truly yours,

[fol. 78]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 40

February 26, 1959

Mr. G. Keith Funston
President
New York Stock Exchange
11 Wall Street
New York, New York

Mr. Edward C. Werle
Chairman, Board of Governors
New York Stock Exchange
11 Wall Street
New York, New York

Dear Sirs:

On February 13 temporary approval for a stock ticker installation in our office was withdrawn, and our direct telephone wires to various members of the New York Stock Exchange were discontinued, at the request of the New York Stock Exchange.

On February 13 I telephoned Mr. Platow, Assistant Manager, Department of Member Firms, who would give me no reason for the discontinuance of our facilities. On February 16 I visited Mr. Walter Coleman of the same department, and I was again unable to ascertain the reason for this discontinuance.

The private wires to our Municipal Bond Department had been installed since approximately September 1956. The private wires in the Corporate operation and the stock ticker had been installed since July 1958.

I feel that it is most imperative that I be advised of the reasons for the discontinuance of our wires and stock ticker [fol. 79] service in order that we may have the opportunity to set forth our position.

I appeal to your sense of justice and ask for the following: (1) Temporary reinstatement of the services, (2) that we be advised of the reasons for the action of the New York Stock Exchange, and (3) that we be given an opportunity to answer any charges and present whatever information you may require.

The action of the New York Stock Exchange against our firm involves twenty-six employees, and irreparable damage, financial and to their reputations, is being suffered by the firm and its employees. Temporary reinstatement of the services, pending a review of our matter, and prompt consideration and the granting of our request will serve to minimize damages.

Very truly yours,

HAROLD J. SILVER

[fol. 80]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 41

NEW YORK STOCK EXCHANGE
Eleven Wall Street
New York 5, N. Y.

March 4, 1959

Mr. Harold J. Silver
Municipal Securities Co.
600 1st National Bank Bldg.
Dallas 2, Texas

Dear Mr. Silver:

Thank you for writing to me about your problem.

While I can understand your position in wanting to know specific reasons for the recent action taken by the Exchange in connection with private wire and ticker service to your organization, I am sure you can also understand our position in declining to furnish such details.

Before taking any such action, the Exchange always makes a very careful and very thorough investigation.

I have personally reviewed the scope and results of such investigation in this case, and feel that the Exchange acted properly.

Sincerely,

/s/ G. KEITH FUNSTON

[fol. 81]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 42

NEW YORK STOCK EXCHANGE
Eleven Wall Street
New York 5, N. Y.

March 9, 1959

Mr. Harold J. Silver
Municipal Securities Co.
600 1st National Bank Bldg.
Dallas 2, Texas

Dear Mr. Silver:

I have just returned from an out of town trip—hence the delay in replying to your letter of February 26th.

As a matter of long standing policy, the Exchange does not furnish detailed reasons for its action in either approving or disapproving private wires or ticker service for non-members.

However, I have reviewed our files, and am in entire accord with the action taken by the Exchange.

Very truly yours,

s/ EDWARD C. WERLE

[fol. 82]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 43

SANDERS & COMPANY
Members New York Stock Exchange
Republic National Bank Bldg.
Dallas

March 9, 1959

New York Stock Exchange
11 Wall Street
New York 5, N. Y.

Gentlemen:

At the request of Mr. Harold J. Silver, we wish to advise you that we have had several trades with the Municipal Securities Company, both in over-the-counter stocks and stocks listed on the New York Stock Exchange, since about the middle part of July, 1958.

All of the transactions and business dealings that we have had with the firm of Municipal Securities Company and Municipal Securities Company, Inc. have been completely satisfactory.

Sincerely yours,

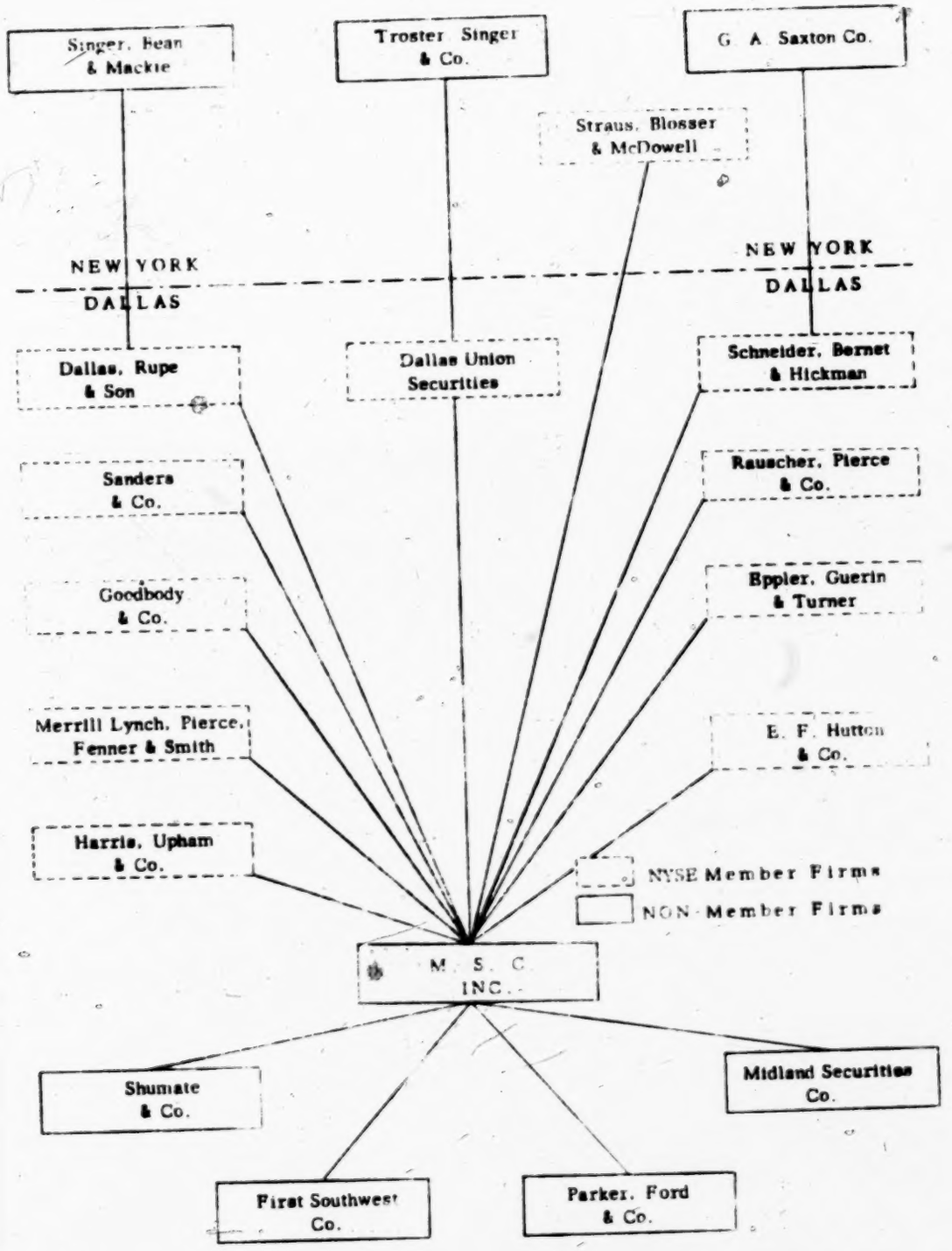
s/ Allen L. Oliver, Jr.
ALLEN L. OLIVER, JR.

ALO:lw

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 56

(See opposite) ☞



MSC. INC. PRIVATE WIRE NETWORK AS OF FEBRUARY 1, 1960 EXHIBIT No. 56

[fol. 84]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 57

(See opposite) ☞

MSC, INC. Transactions as Principal in Over-the-Counter Securities

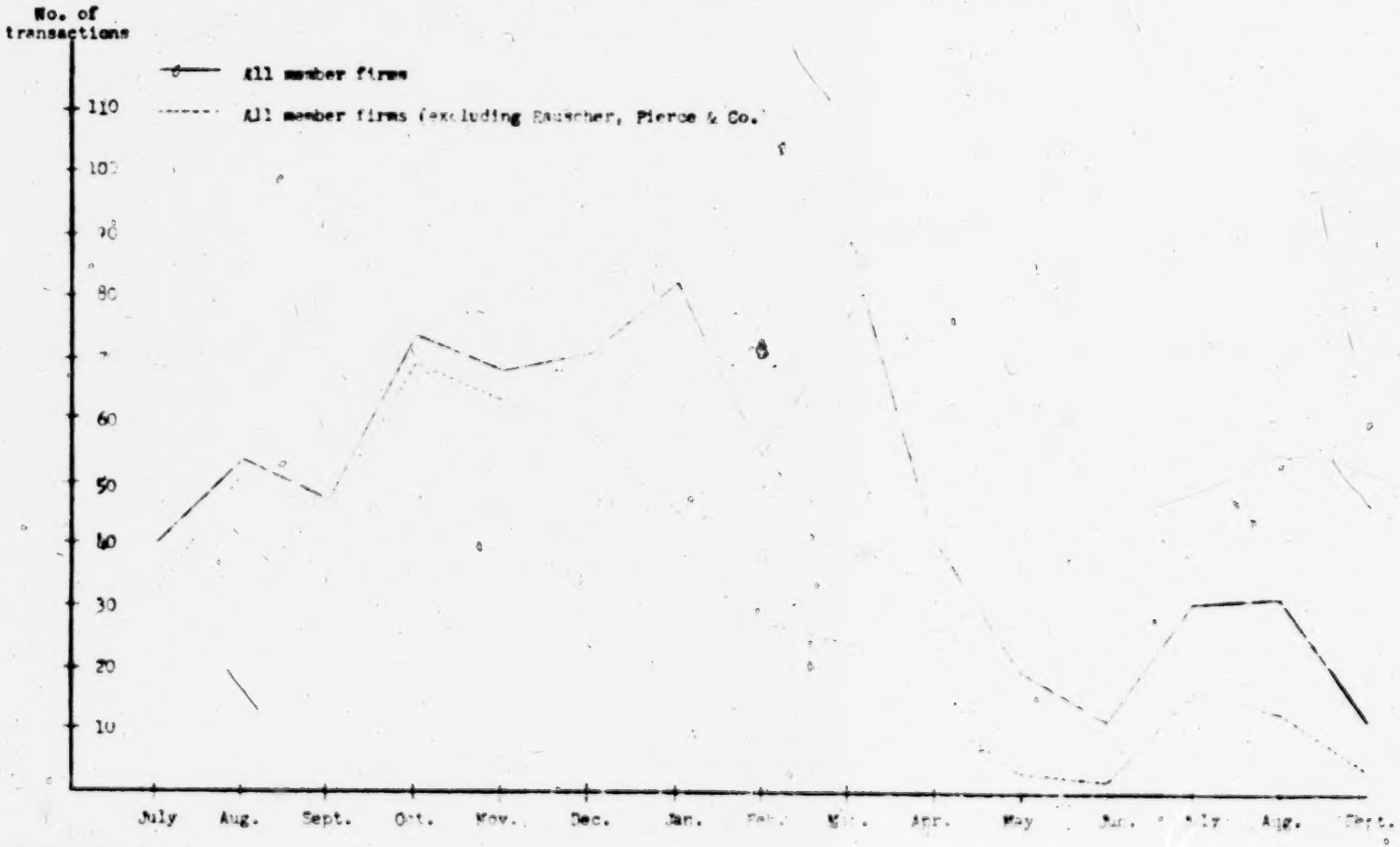


EXHIBIT NO. 58

[fol. 86]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 58

(See opposite) ☞

	Goodbody & Co.		Harris-Upham & Co.		Sanders & Co.		E.F. Hutton & Co.		Schneider, Bernet & Hickman		Dallas, Pupe & Sons		Eppler, Guerin & Turner		Merrill Lynch, Pierce, Fenner & Smith		Straus, Blosser & McDowell		Rauscher, Pierce & Co. *	
	OTC	Listed	OTC	Listed	OTC	Listed	OTC	Listed	OTC	Listed	OTC	Listed	OTC	Listed	OTC	Listed	OTC	Listed	OTC	Listed
1958																				
July	3	—	1	1	3	—	6	—	—	—	3	—	7	2	10	—	—	—	7	9
Aug.	4	—	—	—	—	—	6	—	1	—	9	2	10	2	21	—	—	—	3	7
Sept.	7	—	—	5	1	—	2	—	[illegible]	—	4	1	11	—	16	—	—	—	1	16
Oct.	—	—	—	3	1	2	5	—	5	—	18	—	3	2	10	—	28	10	4	21
Nov.	—	—	2	—	6	—	5	—	1	—	2	—	—	—	10	—	33	15	4	31
Dec.	5	1	—	1	6	2	—	—	1	—	5	—	2	3	11	—	29	18	12	36
1959																				
Jan.	6	—	—	3	2	—	4	—	4	—	—	—	8	—	15	—	7	19	37	45
Feb.	—	—	2	1	2	—	2	—	2	—	—	—	4	2	6	—	9	1	26	39
Mar.	—	—	1	—	7	—	1	—	2	—	11	—	1	3	3	—	1	—	56	34
Apr.	—	—	1	1	4	3	1	—	—	—	1	—	—	—	7	—	—	—	26	50
May	—	—	—	1	2	—	1	—	—	—	2	—	—	1	—	—	—	—	15	40
June	—	—	—	—	3	1	—	—	—	—	—	—	—	3	—	—	—	—	2	43
July	—	—	—	—	8	—	10	—	3	—	4	—	—	—	1	—	1	—	13	37
Aug.	—	—	—	—	5	—	3	—	—	—	5	—	—	—	1	—	—	—	13	25
Sept.	—	—	—	—	3	—	—	—	—	—	1	—	1	—	—	—	—	—	2	11

*Total transactions with Rauscher, Pierce & Co. for period of Nov., 1958 to April, 1959 was 161.
Of this total, 41 transactions were in Dallas Oil of Texas, a "penny" stock in which MSC, INC. was specializing.

EXHIBIT NO. 53

[fol. 88]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 59

(See opposite) ☞

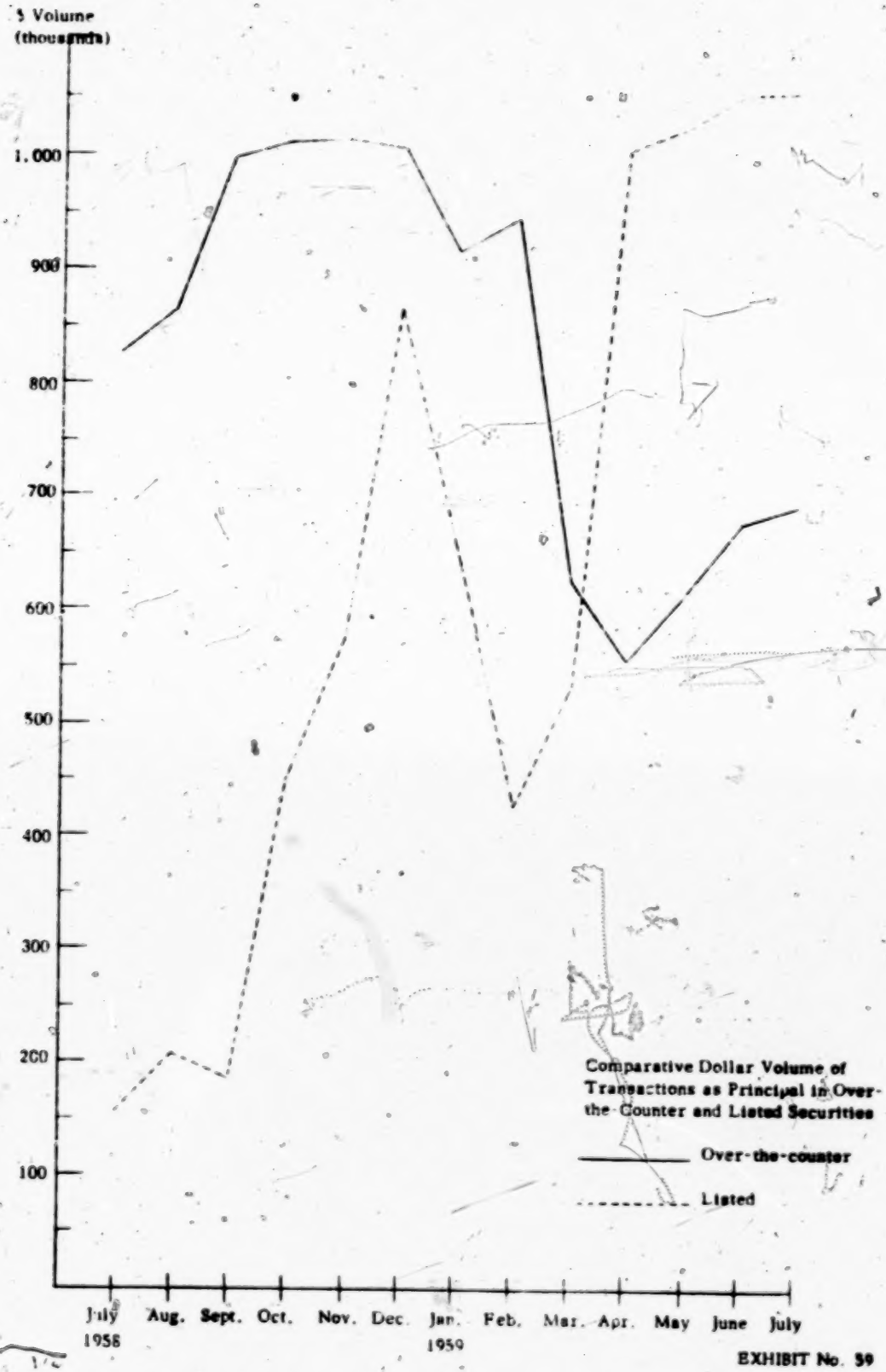


EXHIBIT No. 59

[fol. 90]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 68

(See opposite) ☞

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 69

(See opposite) ☞

[fol. 93]

CHANGES AND CREDITS

BILL R18 5081

DIALAPHONES	6 25 AUG 4	AUG 5		83
CHARGE FOR INSTALLING				20 00

U S TAX AT [illegible] OF ITEMS INDICATED [illegible] 08

TOTAL CARRIED TO BILL 20 91

[illegible] NO CHANGE TO THE END OF THE BILLING

[fol. 94]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 70

TELETYPE CHARGES NECESSITATED BY THE DISCONTINUANCE OF THE STRAUS, BLOSSER & MCDOWELL WIRE TO MUNICIPAL SECURITIES COMPANY, INC.

Date		Stock	Sold To	Teletype Charges
2-13-59	100	Delhi Taylor	Dempsey, Tegeler Co., Houston	$ .95
2-16-59	300	Delhi Taylor	Dempsey, Tegeler Co., Houston	.75
2-13-59	200	Jefferson Lake Wts.	Jacques Coe & Co., New York City	1.55
2-24-59	200	Electro Refractories	Doyle O'Connor & Co., Chicago	1.90
2-24-59	128	Electro Refractories	Doyle O'Connor & Co., Chicago	1.90
2-25-59	300	Baltimore Paint	L. H. Rothchild, New York City	1.58
2-26-59	200	Baltimore Paint	L. H. Rothchild, New York City	1.55
3-10-59	$3,300.	Berlin 4 1/2/78	C. Marks Co., New York City	1.55
3-11-59	1,000	American Dryer	L. H. Rothchild, New York City	1.55
3-13-59	200	Mid West Instruments	L. H. Rothchild, New York City	1.55
3-17-59	200	Amer. Indep. Re-Ins.	Grimm Co., New York City	1.55
3-18-59	75	National Propane Pfd.	Dean Witter & Co., Chicago	1.55
3-19-59	200	San Jacinto Pet.	Allen Co., New York City	1.55
3-31-59	200	Mid-West Instruments	L. H. Rothchild, New York City	1.55
4- 1-59	200	Mid-West Instruments	L. H. Rothchild, New York City	1.55
4- 2-59	100	Mid-West Instruments	L. H. Rothchild, New York City	1.55
4- 2-59	200	Mid-West Instruments	L. H. Rothchild, New York City	1.55
4- 2-59	200	Mid-West Instruments	L. H. Rothchild, New York City	1.55
4- 3-59	100	Mid-West Instruments	L. H. Rothchild, New York City	1.55
4- 3-59	150	Mid West Instruments	L. H. Rothchild, New York City	1.55
4- 3-59	200	Mid West Instruments	L. H. Rothchild, New York City	1.55
4-13-59	100	Mid-West Instruments	L. H. Rothchild, New York City	2.00
4-17-59	200	Gulf Sulphur	Hardy & Hardy, New York City	1.55
4-27-59	200	American Dryer	Hill Darlington Co., New York City	1.55
4-28-59	100	Baltimore Paint	L. H. Rothchild, New York City	1.55
4-29-59	100	American Dryer	Hill Darlington Co., New York City	1.55
4-30-59	300	American Dryer	Hardy & Hardy, New York City	1.55
4-30-59	300	American Dryer	L. H. Rothchild, New York City	1.55
5- 6-59	1,000	Ling Electronics, Pfd.	White Weld & Co., New York City	1.55
5-11-59	10M	Ling Electronics 5¾%	L. H. Rothchild, New York City	1.55
5-15-59	1,000	Ling Electronics, Pfd.	L. H. Rothchild, New York City	1.55
5-15-59	1,000	Ling Electronics, Pfd.	L. H. Rothchild, New York City	1.55
5-15-59	50	Kirby Lumber Co.	David Morris & Co., New York City	1.55
5-18-59	100	Mid-West Instruments	L. H. Rothchild, New York City	1.55
5-18-59	200	Mid-West Instruments	L. H. Rothchild, New York City	1.55
5-18-59	500	Ling Electronics, Pfd.	White Weld & Co., New York City	1.55

[fol. 95]

Date		Stock	Sold To	Teletype Charges
5-19-59	491	Ling Electronics. Pfd	L. H. Rothchild, New York City	1.55
5-21-59	400	Avien, Inc.	George O'Neill & Co., New York City	1.55
6- 2-59	1,000	Dixon Chemical Indust	Joseph Lann Securities, New York City	1.55
6- 3-59	200	Mid-Western Instruments	L. H. Rothchild, New York City	1.55
6- 5-59	1,000	American Dryer	Hardy & Hardy, New York City	1.55
6- 5-59	1,000	Dixon Chemical Indust.	Hardy & Hardy, New York City	1.55
6- 9-59	1,000	Dixon Chemical Indust.	Hardy & Co., New York City	1.55
6- 9-59	4,000	Dixon Chemical Indust.	Joseph Lann Securities, New York City	1.55
6- 9-59	4,000	Dixon Chemical Indust.	Joseph Lann Securities, New York City	1.55
6-10-59	2,500	Dixon Chemical Indust.	Hardy Co., New York City	1.55
6-11-59	200	Electronics Engineering of California	Hardy & Hardy, New York City	1.55
6-12-59	200	Dixon Chemical Indust.	Hardy & Co., New York City	1.55

Date		Stock	Bought From	Teletype Charges
2-18-59	100	Baltimore Paint	L. H. Rothchild, New York City	1.55
2-18-59	300	Baltimore Paint	L. H. Rothchild, New York City	1.55
2-19-59	100	Pan American Sulphur	Hardy & Hardy, New York City	1.55
2-19-59	300	Pan American Sulphur	Hardy & Hardy, New York City	1.55
2-25-59	5,000	Dallas Oil	Hardy & Hardy, New York City	1.55
2-26-59	5,000	Dallas Oil	Hardy & Hardy, New York City	1.55
2-26-59	2,000	Dallas Oil	Hardy & Hardy, New York City	1.55
2-26-59	2,000	Dallas Oil	Hardy & Hardy, New York City	1.55
2-27-59	300	Jefferson Lake Pet.	Charles King Co., New York City	1.55
3- 2-59	225	San Jacinto Pet.	Smith, Barney, New York City	1.55
3- 4-59	200	Mid-West Instruments	Gold Weinman, New York City	1.55
3- 4-59	200	Mid-West Instruments	Gold Weinman, New York City	1.55
3- 4-59	200	Mid-West Instruments	Gold Weinman, New York City	1.55
3- 5-59	150	San Jacinto Pet.	White Weld, New York City	1.55
3- 5-59	200	Mid-West Instruments	Allen Co., New York City	1.55
3- 5-59	100	Mid-West Instruments	Allen Co., New York City	1.55
3- 9-59	600	Barcalo Mfg.	Straus, Blosser & McDowell, Chicago	1.20
3-19-59	20	Pan American Sulphur	Dempsey, Tegeler, Houston	1.15
3-25-59	200	Globe & Republic	John C. Legg Co., New York City	2.45
3-25-59	2,000	Dallas Oil of Texas	Hardy & Hardy, New York City	2.45
3-26-59	300	ARVIDA	Hardy & Hardy, New York City	1.55
4- 5-59	100	Public Service New Mexico Pfd.	A. P. Montgomery, New York City	2.00
4- 7-59	10	Public Service New Mexico Pfd.	A. P. Montgomery, New York City	1.55
4-10-59	200	Baltimore Paint	L. H. Rothchild, New York, N. Y.	1.55
4-14-59	10M	Ling Electronics 5¾%	Wayne Hammer, Chicago	2.25
4-15-59		Dallas Oil of Texas. 3,000	Hardy & Hardy, New York City	1.55

[fol. 96]

Date		Stock	Bought From	Teletype Charges
5- 6-59	400	Riverside Plastics	Hardy & Hardy, New York City	1.55
5- 6-59	400	Riverside Plastics	Hardy & Hardy, New York City	1.55
5-11-59		Baltimore Paint, 500	Hill Darlington, New York City	1.55
5-11-59	20[illegible]	Textron 5's 1971	Asiel Co., New York City	2.00
5-11-59	20[illegible]	Textron 5's 1971	Asiel Co., New York City	2.00
5-12-59	100	Dixon Chem. Industries	Hardy & Co., New York City	1.55
5-12-59	1,[illegible]	Riverside Plastics	George O'Neill Co., New York City	1.55
5-15-59	[illegible]	Avien	Wm. Frankel Co., New York City	1.55
5-19-59	100	Dixon Chem. Industries	Hardy & Co., New York City	1.55
5-19-59	[illegible]	Textron 5's 1971	Asiel Co., New York City	2.00
5-21-59	[illegible]	Meadow Brook Nat'l. Bank	New York Hanseatic, New York City	1.55
5-21-59	125	National Terminal	Swift Henke, Chicago	1.55
5-21-59	50	Texas Eastern Trans. Pfd.	Eastman, Dillion, New York City	1.55
5-21-59	100	Dixon Chem. Industries	Hardy & Co., New York City	2.00
5-21-59	200	Dixon Chem. Industries	Hardy & Co., New York City	2.00
5-22-59	500	Bates Mfg.	Eastern Securities, New York City	1.55
5-26-59	100	Avien	George O'Neill, New York City	1.55
5-26-59	200	Dixon Chem. Industries	Hardy & Co., New York City	1.55
5-27-59	200	Texas Eastern Trans.	Allen Co., New York City	1.55
5-29-59	25	National Terminal	Swift, Henke, Chicago	1.20
6- 1-59	50	Bates Mfg.	N. Y. Hanseatic Corp., New York City	1.55
6- 1-59	10	Dixon Chem. Industries Units	Hardy & Co., New York City	1.55
6- 2-59	100	Baltimore Paint	L. H. Rothchild, New York City	1.55
6- 2-59	200	Dixon Chem. Industries	First Chelsea Corp., New York City	2.00
6- 2-59	200	Dixon Chem. Industries	Joseph Lann Sec., New York City	1.55
6- 4-59	300	Ling Electronics	N. Y. Hanseatic Corp., New York City	2.00
6- 8-59	200	Dixon Chem. Industries	Birnbaum & Co., New York City	1.55
6- 8-59	80	Dixon Chem. Industries	Birnbaum & Co., New York City	1.55
6- 9-59	100	Amer. Ins. of Newark	F. I. DuPont, New York City	1.55
6-10-59	150	Dixon Chem. Industries	Joseph Lann, New York City	1.55
6-10-59	200	Dixon Chem. Industries	First Chelsea, New York City	2.00
6-11-59	50	Ryder System	New York Hanseatic, New York City	1.55
6-12-59	400	Dixon Chem. Industries	Hardy & Co., New York City	1.55
5-12-59	100	Dixon Chem. Industries	First Chelsea, New York City	1.55
6-15-59	200	American Dryer	Birnbaum Co., New York City	1.55
Total				$184.18
Plus 10% Federal Excise Tax				18.42
Grand Total				$202.60

[fol. 97]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 71

MUNICIPAL SECURITIES COMPANY
(a Proprietorship)

STATEMENT OF INCOME

For the year ended December 31, 1958
with comparative figures for 1957

	1958	1957
Operating income:		
Gross profits on securities transactions, based on acquisition cost of inventory securities	$205,991.77	91,676.18
Adjustment, increase (decrease), to state inventory securities at lower of cost or market	(81,445.58)	22,925.29
	124,546.19	114,601.47
Operating expenses:		
Proprietor's salary	15,000.00	15,000.00
Office salaries	134,778.80	57,869.80
Advertising	5,062.45	2,428.51
Automobile	3,693.39	2,549.55
Entertainment and promotion	6,899.35	3,366.40
Dues and subscriptions	6,735.55	4,145.08
License fees	290.00	154.10
Insurance	2,667.51	1,838.94
Office supplies	4,253.99	4,012.70
Stationery	2,742.97	2,302.33
Postage	3,643.50	1,437.58
Professional services	10,402.16	9,168.86

[fol. 98]

	1958	1957
Rent	10,909.50	10,715.00
Service charges	4,970.19	3,397.82
Taxes	1,861.23	1,510.85
Telephone and telegraph	21,372.19	17,808.38
Travel	36,741.48	20,875.71
Depreciation	6,021.77	5,395.94
Bidding expense	102.15	275.87
Books and periodicals	693.06	625.29
Charitable contributions	234.00	150.00
Commissions	6,624.87	1,916.87
Bond issuing expense	15,080.78	121.94
Miscellaneous	2,476.63	121.66
	303,257.52	167,189.18
	(178,711.33)	(52,587.71)
Other income:		
Interest on municipal securities	45,230.51	46,994.52
Interest on notes receivable	17,995.48	5,173.19
Gain on sale of investment securities	100,611.42	—
	163,837.41	52,167.71
	(14,873.92)	(420.00)
Other charges—interest expense	18,733.87	9,820.57
Net loss for year	$(33,607.79)	(10,240.57)

See notes to accompanying balance sheet.

[fol. 99]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN OPPOSITION OF FRANK J. COYLE

State of New York,
County of New York, ss.:

Frank J. Coyle, being duly sworn says:

I am a vice president of defendant and in charge of its Department of Member Firms. I have read the affidavits of Harold J. Silver, sworn to April 19, 1960, and of Harry F. Reed, sworn to April 20, 1960, submitted in support of plaintiffs' motion for summary judgment on the first cause of action and plaintiff Municipal Securities Company's (herein "Municipal") motion for an injunction and make this affidavit in opposition to such motions.

The first cause of action alleges in substance that defendant conspired with certain of its member firms (1) to withdraw the temporary approval previously given for private wire connections between such member firms and Municipal Securities Company, Inc. (herein "Municipal, Inc."), (2) to discontinue private wire connections previously installed by Municipal with several of such member firms without defendant's approval and (3) to withdraw the continuous stock quotations (herein "stock ticker service") furnished by defendant to Municipal, Inc., pending defendant's investigations. The member firms of defendant are named as co-conspirators but not as defendants.

Defendant concedes that member firms having private wire connections with Municipal, Inc. were informed that defendant had withdrawn its temporary approval and that the member firms having unapproved private wire connections with Municipal were requested to discontinue them. [fol. 100] Defendant and not its member firms furnished the stock ticker service to Municipal, Inc. and the withdrawal of the stock ticker service was the unilateral act of defendant. The member firms did not participate therein.

"Virtually all" of Municipal's activities were concerned with transactions in municipal bonds (Silver aff., p. 1).

Municipal, Inc. was engaged in the over-the-counter securities market (Silver aff., p. 2). A few issues of municipal bonds and no over-the-counter securities are traded or listed for trading with defendant. Moreover, the transactions therein are not reported on the stock ticker service of defendant.

The principal place of business of Municipal and Municipal, Inc. was Dallas, Texas, a city for which the mid-year 1959 edition of "Security Dealers of North America" listed 56 broker dealers who were not members of defendant, 33 of whom had no private wire connections with member firms of defendant and 53 no stock ticker service of defendant. The same edition of "Security Dealers of North America" listed approximately 6,260 broker dealers. Approximately 5,600 of them were not member firms of defendant and approximately 3,100 had no private wire connections with member firms of defendant. Less than 450 of the latter had the stock ticker service of defendant, four of whom are in Dallas.

Defendant is an unincorporated membership association. It is duly registered as a national securities exchange with the Securities and Exchange Commission under the Securities and Exchange Act of 1934. It has its principal place of business at 11 Wall Street, New York City, and there provides a quality market for its members to execute orders for their own account and for the account of present and prospective investors in the securities listed for trading with defendant. Its constitution, by-laws, rules, regulations and the amendments thereto were filed with the Commission when, by order dated September 28, 1934, it registered defendant as a national securities exchange. Among defen- [fol. 101] dant's standards and rules so filed were those applying to private wire connections of member firms with non-members and to the furnishing of ticker service by defendant to non-members.

Defendant adopted standards and rules for its members which it deemed advisable and necessary to protect the investing public and to maintain a quality market. They were developed over the years on an evolutionary basis. They are not set forth in detail only because it would be

impossible to detail them. They do embrace all of the factors having any bearing on the character, reputation and business ethics of the party making the application. Defendant's exercise of judgment is predicated on the basis of all of the information assembled and the possible effect thereof on defendant's repute and standing with the investing public. Defendant was required to and did file such standards and rules with the Commission, the body charged with the administration of the Act. They were subject to review and were not conclusive upon the Commission. The Commission, however, did not find them to be in anywise inconsistent with the Act, the rules and regulations thereunder or any other law. On the contrary, it did find that the standards and rules "are just and adequate to insure fair dealing and to protect investors." In its first annual report for the fiscal year ended June 30, 1935, the Securities and Exchange Commission said, among other things, with respect to the registration of exchanges as national securities exchanges:

> "Pursuant to section 6 of the Securities Exchange Act of 1934, 24 exchanges submitted applications for registration as national securities exchanges.
>
> "In considering these applications, the constitution, bylaws, and rules and regulations of each exchange were examined and analyzed. Each exchange was required to execute an agreement to comply with the provisions of the act and any rules and regulations [fol. 102] thereunder, and to enforce compliance with such provisions by its members, so far as is within its power. Each exchange was also required to include in its rules provision for the expulsion, suspension, or disciplining of members for conduct or proceeding inconsistent with just and equitable principles of trade, and to declare that willful violation of any provision of such act or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.
>
> * * * * * * *
>
> "From time to time during the year, such registered exchanges filed amendments to their registration state-

ments. These amendments covered changes in membership, in exchange trading rules, securities admitted to listed or unlisted trading privileges, and in the rules for the government of exchanges. Such amendments were subjected to thorough analysis to ascertain whether the exchanges were being maintained in compliance with the provisions of the Securities Exchange Act of 1934, and the rules and regulations thereunder."

Defendant's members make no complaint with respect to the standards and rules. Complaint is made by non-members with respect to standards and rules having application only to defendant's members.

Municipal installed private wire connections in 1956 between its office and the municipal bond departments in the Dallas offices of two of defendant's member firms. About the same time, private wires were also installed by Municipal with a non-member of defendant and with the bond departments of three Dallas banks (Silver aff., p. 7).

Two years later, Municipal, Inc. made formal application to defendant for private wire connections with member [fol. 103] firms of defendant. The formal application was signed by Silver, as president of Municipal, Inc., and is dated June 13, 1958 (Moving papers, Ex. 4). It specifically provides in paragraph 6 thereof that: "The said wire or other connections and the furnishing of said quotations to us shall be discontinued whenever you shall withdraw approval thereof." Upon receipt of the "Information to be furnished by non-member for private wire connections or ticker service," signed by Silver, as president of Municipal, Inc., and dated June 13, 1958, (Moving papers, Ex. 5) defendant gave temporary approval. Although purporting to list the corporate connections of himself and the other officers of Municipal, Inc., for a ten-year period, Silver failed to do so. He admitted on the taking of his deposition that he had failed to list The Joggler Corporation and Trans-Mar, Inc. He did list Intercontinental Manufacturing Company, Inc., a corporation of which both Mr. and Mrs. Silver had been directors and officers, but he failed to disclose pertinent facts with respect thereto.

Municipal, Inc. also made application for defendant's stock ticker service. Under date of June 23, 1958, Municipal, Inc., by Silver, as president, signed an "Agreement for continuous quotations" (Moving papers, Ex. 14), and defendant gave its temporary approval pending further processing (Moving papers, Ex. 15). That agreement specified terms and conditions on which the stock ticker service was to be furnished. It specifically provided, among other things, that such service was for the "individual use" of Municipal, Inc. in its business, that Municipal, Inc. would strictly comply with its terms, that defendant, with or without notice, might forthwith discontinue the stock ticker service "whenever in its judgment there shall have been any breach of the foregoing agreements, or any of them" and, further, that even after fully approved, defendant might terminate on thirty days written notice.

As was its practice, defendant undertook an investigation of Municipal, Inc. and its officers through independent agen- [fol. 104] cies which defendant believed to be reliable and well qualified. The investigation disclosed, among other things, that the Defense Department has suspended the security clearance of Intercontinental and of the Silvers in 1953, and that their repeated efforts to have the suspension lifted had met with no success.

The investigation also disclosed much other information with respect to the Silvers. Among such other information was the fact that within two months of the time of the exchange of shares of Intercontinental for shares of U. S. Hoffman Machinery Corp. by the Silvers and after they had gone on record in writing that they had no present intention of doing so, they commenced selling their U. S. Hoffman stock.

Although plaintiffs would have this Court believe that the Silvers had not been informed of the specific charges which resulted in the suspension of their security clearance, the facts demonstrate the contrary. One of the documents produced on the taking of Silver's deposition disclosed they had been apprised that the charges were specified in sub-paragraphs of the Industrial Personnel and Facility Security clearance program, to wit, that they "intention-

ally and without authorization disclosed classified security information to Brady Aviation Corp., prior to clearance of that corporation," that they "willfully disregarded security regulations," that their "behavior, activities and associations tend to show that you are not reliable and trustworthy," that they "deliberately falsified facts and omitted to reveal certain material facts regarding the stock ownership of Intercontinental Manufacturing Company, Inc. to official representatives of the U. S. Navy and U. S. Air Force during the original and subsequent security clearance actions required," and that the "personal association with foreign nationals who hold a financial interest in Intercontinental Manufacturing Company, Inc. is of such nature as to lead the Board to believe that you might be subject to coercion, influence or pressure which might cause [fol. 105] you to act contrary to the best interests of national security."

Defendant ascertained that under date of January 7, 1954, the Screening Division of the Central Industrial Personnel Security Board, after consideration of all information available, had denied the Silvers security clearance for the reasons set forth in the Board's prior letter dated November 30, 1953, that the Silvers were advised they could appeal and the procedure available for review on appeal, that they requested and were granted a hearing on appeal that they appeared by counsel and in person and testified and were accorded a full hearing. Silver conceded that denial of their security clearance was affirmed and is still effective.

Defendant's investigation disclosed information which led it to conclude that the temporary approval for the private wire connections and for the stock ticker service should be withdrawn. It thereupon informed the member firms having the private wire connections with Municipal, Inc. of such withdrawal. Under date of February 13, 1959, defendant advised Municipal, Inc. that the stock ticker service would be withdrawn effective at the close of business on February 18, 1959.

Plaintiffs moved for discovery and inspection of all documents in defendant's files bearing on its investigation.

Certain of the documents contained information believed to be derogatory to the Silvers and defendant took the position that such information should be furnished only after direction by the Court. On February 25, 1960, after being shown the documents in question, Judge Bicks ruled that they need not be shown to plaintiffs unless plaintiffs first executed releases in favor of defendant, its investigating agencies and the persons who furnished the information. The following day plaintiffs applied to Judge Bicks for an order to preclude defendant from offering in evidence the documents or any of the information contained therein. Judge Bicks denied that application and adhered [fol. 106] to his prior determination. Later, on the taking of the deposition of Walter Coleman, an employee of defendant, plaintiffs sought without success to obtain by indirection such documents and information. They then moved, among other things, to compel answers to specified questions which might have led to a disclosure of the information. In a memorandum opinion, Chief Judge Ryan limited plaintiffs' further inquiry in the light of the decision of Judge Bicks. In their moving affidavit on that motion, plaintiffs' counsel stated: "Plaintiffs recognize that they are bound by the terms of Judge Bicks' order, unless such order is subsequently set aside on appeal, and have elected not to execute releases in favor of individuals who have been the source of derogatory information which plaintiffs believe must be false." The documents in question will be handed to the Court at the time of the argument. They, as well as the other matters developed by the investigation, demonstrate that defendant did not act arbitrarily in withdrawing the temporary approval of the private wire connections with Municipal, Inc., and that defendant had good cause for withdrawing the stock ticker service.

At this point, it is important to analyze the exact nature of the claim. It is not charged that the withdrawal of the temporary approval of the private wire connections and of the stock ticker service prevented Municipal, Inc. or Municipal from conducting business on the same terms as prior to such withdrawal. Complaint is directed to the change in method of communication necessitated by the

withdrawal. Communication by private wire connections was found to be more convenient than other means of communication. Defendant's members continued to do business with both Municipal, Inc. and Municipal on the same terms as with all other customers. Municipal, Inc. concedes that "transactions in listed securities showed a sharp increase" after the withdrawal (Reed aff., p. 7). Silver testified that Municipal, Inc. and Municipal continued to do business with the same member firms of defendant after withdrawal [fol. 107] of the temporary approval of the private wire connections as prior thereto. None of defendant's members refused to do business with Municipal, Inc. or Municipal. None of them did business with Municipal, Inc. or Municipal on terms which differed from other customers, or, in other words, discriminatory terms. Withdrawal of such private wire connections and of the stock ticker service did not affect the number of broker dealers in securities. It did not affect the available supply of municipal bonds, over-the-counter securities or listed securities. It did not affect the number of purchasers or sellers of such municipal bonds, over-the-counter securities or listed securities. It did nothing more than to put Municipal, Inc. in the same position it was in before the temporary approval had been granted. The facts refute any refusal by any of defendant's members to deal with Municipal, Inc. and Municipal, that any of them dealt with Municipal, Inc. and Municipal on discriminatory terms or that any member of defendant gained or could gain any competitive advantage by defendant's withdrawal of the temporary approval of the private wire connections or of the stock ticker service.

As I previously stated, comparatively few issues of municipal bonds and no over-the-counter securities are traded or listed for trading with defendant and the trades therein are not reported on the stock ticker service. A large portion of the trading in over-the-counter securities is done by broker dealers who are non-members of defendant. Plaintiffs concede that in addition to the private wire connections with member firms of defendant, Municipal, Inc. had private wire connections with the trading desks of a number of broker dealers in Dallas who were not member

firms of defendant (Silver aff., p. 10, Reed aff., p. 4). Such private wires were unaffected by defendant's action. A study of the over-the-counter securities markets made by the Wharton School, University of Pennsylvania, and published in 1958, discloses that for the most part, broker [fol. 108] dealers purchase such securities for their own account and then later resell them. Municipal, Inc. concedes it derived most of its income by trading for its own account (Reed aff., p. 4) and that its change from a profitable operation to a losing one was caused solely by its inability to maintain effectively its over-the-counter trading profits (Reed aff., p. 9). It should be noted that listed securities represent the substantial volume of all business done by member firms of defendant. Municipal, Inc. is on record that it received no commission or fees "of any kind for this business" (Silver aff., p. 11). Banking institutions throughout the United States do a substantial portion of the municipal bond trading. Municipal admits it had private wire connections with three Dallas banks. The discontinuance of the private wire connections of member firms of defendant with Municipal did not affect Municipal's private wire connections with the Dallas banks.

The implication that defendant may have dictated Eastern Securities' decision not to establish a private wire connection with Municipal, Inc. (Silver aff., p. 22) is unwarranted and has no basis in fact.[9] At all times, defendant has confined the enforcement of its standards and rules to its members.

Plaintiffs stress the alleged inconvenience in the use of a public telephone as contrasted with private wires in communicating with defendant's members. I again emphasize that defendant withdrew the temporary approval of the private wire connections only of its members with Municipal, Inc. The private wire connections of Municipal, Inc. with broker dealers in over-the-counter securities other than member firms of defendant belie the contention that Municipal, Inc. was unable to continue its business. Thirty-three other broker dealers in Dallas alone were able to conduct their business without such private wire connections. Furthermore, Municipal, Inc. continued to deal with

member firms of defendant after the private wire connections were discontinued on the same terms as prior thereto [fol. 109] and it is conceded that Municipal, Inc.'s trading in listed securities "showed a sharp increase" (Reed aff., p. 7).

Plaintiffs make no mention of the quotations appearing each morning in the National Quotation Bureau sheets which give the bid-ask quotations as of the preceding afternoon of each of the dealers making a market in specific over-the-counter securities, the Dow-Jones ticker service which furnishes periodic reports daily on stock and bond activity and current items of interest to the business world, or of the other means of communication available and used by them and numerous other broker dealers. The Bell System 1959 National Teletypewriter Directory lists Municipal as a subscriber with two Dallas numbers for its corporate and municipal departments. Dallas Rupe & Son is the only alleged conspirator not listed in that National Teletypewriter Directory. Finally, the volume of business of Municipal, Inc. in over-the-counter securities could not have increased by $184,000 for the first six months period after withdrawal of the temporary approval of the private wire connections with defendant's member firms (Reed aff., p. 10) without some effective system of communication with other broker dealers in such securities. Municipal, Inc. ascribes its inability to bring about a more substantial increase in its business to the inability to hire salesmen (Reed aff., p. 10).

The attempt to picture Municipal as a successful and profitable enterprise (Silver aff., p. 20) is not borne out by its financial statements produced on the taking of Silver's deposition. Silver refers to Municipal's gross profits on security transactions for 1958 and 1959 in an endeavor to show that it was a profitable enterprise. The financial statements disclose that Municipal never operated at a profit and that the operating loss was in excess of $52,000 for 1957, $178,000 for 1958 and $186,000 for 1959.

Plaintiffs refer to *Greene* v. *McElroy*, 360 U. S. 474, decided by the Supreme Court of the United States on June 29, 1959 (Silver aff., p. 21). We shall deal with the decision in

[fol. 110] our memorandum. Defendant's investigation did disclose the Defense Department had denied security clearance to the Silvers but defendant's action was predicated on the basis of all of the information disclosed by its investigations. We submit that the Defense Department, as one source of information, was a most reliable source.

It is not defendant's position that private wire connections with member firms and the stock ticker service were not desirable although unnecessary for plaintiffs' business. Approximately 3,100 broker dealers in securities carry on their business without such wire connections and a great many more without stock ticker service. It is defendant's position that private wire connections and stock ticker service are not matters of right for any broker dealer. They are available, however, for all broker dealers who meet defendant's standards and rules.

It is Municipal, Inc.'s position that the stock ticker service was of some value in keeping abreast of movements and trends in security prices generally, that the stock ticker service was desirable as a customer accommodation and would attract customers (Reed aff., p. 2), that the private wire connections with member firms of defendant put Municipal, Inc. in a position to do, but not that it did do, a substantial business by reason thereof. It is conceded that the largest activity of Municipal, Inc. and the one from which it derived most of its income "was in trading for our own account" (Reed aff., p. 4). We quote, "Curiously enough, while the NYSE's disapproval action curtailed our transactions in over-the-counter securities, our transactions in listed securities showed a sharp increase" (Reed aff., p. 7) and, further, that "The change from a profitable operation to a losing one, was caused solely by our inability to maintain effectively our over-the-counter trading profits" (Reed aff., p. 9). These statements bear contrast not only with the later statement that Municipal, Inc. increased the volume of its over-the-counter business from $1,213,000 to $1,396,000 in the first six months after withdrawal of tem-
[fol. 111] porary approval of the private wires and the stock ticker service (Reed aff., p. 10) but the more important facts that "Virtually all" of Municipal's activities were in mu-

nicipal bonds and Municipal, Inc. was "actively engaged" in the over-the-counter securities market, trading in neither of which was reported on defendant's stock ticker service.

I repeat that the first cause of action charges defendant conspired with member firms in withdrawing the temporary approval of the private wire connections and the stock ticker service. Defendant did inform the member firms it had withdrawn the temporary approval of the private wire connections. It acted alone in withdrawing the stock ticker service; thus here, at least, plaintiffs must contend that defendant conspired with itself. Defendant and its members were not participants in any conspiracy. Defendant acted on the basis of information obtained from reliable sources and in strict compliance with its standards and rules and not otherwise.

It is respectfully submitted that there are genuine issues as to most of the material facts and Municipal has failed to make any showing as a matter of fact or of law which would entitle it to a preliminary injunction. The motions should be denied.

Frank J. Coyle

Sworn to before me this 23rd day of May, 1960.

John J. Jerome, Notary Public, State of New York, No. 24-7085650, Qualified in Kings County, Certificate filed in New York County, Commission expires March 30, 1962.

(Seal)

[fol. 112]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN OPPOSITION OF A. DONALD MACKINNON

State of New York,
County of New York, ss.:

A. DONALD MACKINNON, being duly sworn, says:

I am a member of the firm of Milbank, Tweed, Hope & Hadley, attorneys for defendant. I have read the affidavits of Harold J. Silver, sworn to April 19, 1960, and of Harry F. Reed, sworn to April 20, 1960, and make this affidavit to supplement the affidavit of Frank J. Coyle, sworn to May 23, 1960.

I took the deposition of plaintiff Harold J. Silver on February 29, March 1 and March 2, 1960. Among other things, Mr. Silver testified that the Defense Department had suspended the security clearance of both he and Mrs. Silver in 1953 (S. M. 24-25) and that such suspension was still effective (S. M. 56-57). He testified that he received notification of the suspension by a letter similar to the letter hereto annexed, made a part hereof and marked Exhibit A, addressed to Mrs. Silver and dated November 30, 1953. He testified that thereafter he received a letter from the Central Industrial Personnel Security Board dated January 7, 1954, copy of which is hereto annexed, made a part hereof and marked Exhibit B. He also testified that both he and Mrs. Silver availed themselves of their rights and appealed.

The hearing on the appeals was held before the Central Industrial Personnel Security Board, Appeals Division, on March 4 and 5, 1954. The transcript discloses that both Mr. and Mrs. Silver and their witnesses appeared in person [fol. 113] and testified and that they were represented by counsel of their own choosing. The transcript also discloses that the presiding officer informed the Silvers that they would be given an opportunity to refute the "Statement of Reasons" set forth in the letter of November 30, 1953, included in which were the charges that their behavior,

activities and associations tended to show they were "not reliable and trustworthy" and that they "deliberately falsified facts and failed to reveal material facts" with respect to the stock ownership of Intercontinental Manufacturing Company. In my opinion, Mrs. Silver's testimony with respect to what had been done to conceal the stock ownership of Intercontinental, without more, would have justified affirmance. Mrs. Silver was a lawyer of 20 years standing at the Bar. She admitted that what had been done "might have been wrong but, certainly, I didn't mean to do anything wrong by doing it that way."

The Silvers had been afforded full opportunity to testify on each of the "Statement of Reasons". The attorneys were permitted to add to their testimony and to state their own contentions without any limitation.

A. Donald MacKinnon

Sworn to before me this 23rd day of May, 1960.

Louis A. Wolf, Notary Public, State of New York, No. 30-9723500, Qualified in Nassau County, Certificate filed in New York County, Term Expires March 30, 1962.

[fol. 114]

EXHIBIT A TO AFFIDAVIT OF A. DONALD MACKINNON

CENTRAL INDUSTRIAL PERSONNEL SECURITY BOARD
165 North Canal Street
Chicago 6, Illinois

CJV/cl
30 November 1953

Mrs. Evelyn B. Silver
c/o Intercontinental Manufacturing Company
Garland, Texas.

Dear Mrs. Silver:

This is to notify you that a request for your proposed access to classified security information at Intercontinental Manufacturing Company has been submitted to the Central Industrial Personnel Security Board for review and decision.

Based on information available, the Screening Division of this Board has tentatively decided that consent for your employment on classified Army, Navy or Air Force contracts must be denied. The clearance issued by the Supervising Inspector of Naval Material on 17 March 1953 to you is hereby suspended for the following reasons:

Review of the information available to the Board indicates that the granting of clearance to Intercontinental Manufacturing Company is not clearly consistent with the interests of national security. The Screening Division of this Board finds that your case comes within the provisions of the following cited subparagraphs of the Industrial Personnel and Facility Security Clearance Program:

a. Paragraph 12a, Subparagraph (5), in that you intentionally and without authorization disclosed classified security information to the Brady Aviation Corporation prior to the clearance of that Corporation.

b. Paragraph 12a, Subparagraph (14), in that you have wilfully disregarded security regulations.

[fol. 115] c. Paragraph 12a, Subparagraph (15), in that your behavior, activities and associations tend to show that you are not reliable and trustworthy.

d. Paragraph 12a, Subparagraph (16), in that you deliberately falsified facts and omitted to reveal certain material facts regarding the stock ownership of the Intercontinental Manufacturing Company to official representatives of the U. S. Navy and U. S. Air Force during the original and subsequent security clearance actions required.

e. Paragraph 12a, Subparagraph (20), in that the personal association with foreign nationals who hold a financial interest in the Intercontinental Manufacturing Company is of such nature as to lead the Board to believe that you might be subject to coercion, influence, or pressure which might cause you to act contrary to the best interests of national security.

Nothing in the above statement of reasons shall be construed as limiting the scope of the inquiry which may be made by either Division or the basis for its decision, such inquiry and decision being limited only by the criteria stated in the Industrial Personnel and Facility Security Clearance Program.

Before the Screening Division of this Board makes a final determination, you may submit, in writing, any information to explain or refute the information set forth above. Such information may be in the form of letters, statements, or affidavits, and must be mailed to the Board within ten (10) days of the receipt of this letter by you.

In the event of your failure to submit such information, the Screening Division will make a decision based on the information available, without prejudice to your right of subsequent appeal to the Appeal Division of this Board in case of an adverse decision. You have no right to appear before the Screening Division of this Board either in person or be represented by counsel.

[fol. 116] You will be notified of the decision of the Screening Division. If the decision is adverse, you may appeal to

the Appeal Division before whom you may appeal in person and/or be represented by counsel. There is inclosed for your information a copy of the directive establishing this Board.

Sincerely yours,

C. J. VanDerhaeghen

C. J. VanDerhaeghen
Executive Secretary
Central Industrial Personnel Security Bd.

Incl-Basic directive

Exhibit B to Affidavit of A. Donald MacKinnon

Central Industrial Personnel Security Board
Chicago Air Procurement District
14th Floor—165 North Canal Street
Chicago 6, Illinois

7 January 1954

Mr. Harold J. Silver
c/o Intercontinental Mfg. Company, Inc.
Garland, Texas

Dear Mr. Silver:

Reference is made to the letter dated 30 November 1953 addressed to you by the Central Industrial Personnel Security Board in which it was stated that the Board had been requested to consider the granting of consent for your employment on or access to classified Army, Navy or Air Force contract work or information at Intercontinental Mfg. Company.

[fol. 117] On 7 January 1954 the Screening Division of this Board, after consideration of all information available, decided that access by you to classified security information and contract work of the Army, Navy or Air Force is not clearly consistent with the interests of national security and you are hereby notified that consent for your employment on

such work is denied for the reasons stated in the Board's letter referred to above.

You may appeal this decision. To make this appeal, you must file, within thirty (30) days of receipt of this letter, either personally or through an authorized representative, a written request for review of your case with the Chairman, Appeal Division, Central Industrial Personnel Security Board, c/o Chicago Air Procurement District, 14th Floor, 165 North Canal Street, Chicago 6, Illinois.

Two types of review are available: (1) review by the Board of the record, which may include affidavits, documents, or other data you may wish to submit as pertinent to your suitability for employment in connection with classified Defense Department contracts; (2) by filing written notice requesting an administrative hearing before the Appeal Division at which you may appear in person with or without counsel and witnesses of your selection. You are requested to indicate your preference in submitting your appeal.

Failure to file your appeal within thirty (30) days of receipt of this letter will compromise any claim you make for reimbursement if the decision of the Screening Division is reversed.

Sincerely yours,

C. J. VanDerhaeghen

C. J. VanDerhaeghen
Executive Secretary
Central Industrial Personnel
Security Bd.

FD/1

[fol. 118]

In United States District Court

For the Southern District of New York

Reply Affidavit of Harold J. Silver

State of New York,
County of New York, ss.:

Harold J. Silver, being duly sworn, deposes and says:

I submit this affidavit in reply to the affidavits of Frank J. Coyle and A. Donald MacKinnon and in support of plaintiffs' several motions.

The Reasons for the Exchange's Actions.

The defendant now insists that it based its action upon (1) the fact that my wife and I had our security clearance suspended by the Department of Defense (Coyle Aff't, pp. 5-7); (2) the inference that I deliberately failed to advise the Exchange of prior business connections with The Joggler Corporation and Trans-Mar, Inc. and failed to disclose pertinent facts with respect to prior employment by Intercontinental Manufacturing Company, Inc. (Coyle Aff't, p. 5); (3) the claim that I improperly sold stock of the U. S. Hoffman Machinery Co., Inc. after agreeing not to do so (Coyle Aff't, pp. 5-6); and (4) certain unspecified information of an apparently scandalous nature (Coyle Aff't, pp. 7-8).

None of the foregoing is in any way pertinent to plaintiffs' motions which rest on a *per se* doctrine of antitrust law violation. However, because a failure to make reply might be construed as an implied admission of guilt, I believe that defendant's present version of the reasons for its action requires comment.

[fol. 119] It is true that both my wife and I were the subjects of consideration in a security proceeding conducted under the Industrial Personnel Security Regulations of the Department of Defense. It is also true that our clearances were suspended. Neither I nor the New York Stock Exchange can know why our security clearances were suspended. (See Exhibit No. 60, letter of September 5, 1958,

Office of Industrial Personnel Security Review to NYSE; Exhibit No. 61, letter of August 29, 1958 NYSE to Department of Army; Exhibit No. 62, letter of October 13, 1958, Department of Navy to NYSE.) There were a number of charges made against us. We believed we adequately answered all of them. Perhaps the security hearing board acted upon information which we had no opportunity to refute because it was not disclosed to us. This is precisely what the defendant did. I am advised that it was a lack of confrontation which led to the decision of the Supreme Court of the United States in *Greene* v. *McElroy*, 360 U. S. 474 (decided June 29, 1959). That decision declared the procedures of the Industrial Personnel Security Program to be invalidly authorized. I should add that although the answering affidavit of A. Donald MacKinnon makes extensive reference to the transcript of the hearing held before the Appeals Division of the Central Industrial Personnel Security Board, this transcript was not in the possession of defendant when it took the action of February 12, 1959. It was only seen by defendant's representatives when produced by me in discovery proceedings.

In spite of defendant's present attempt to show a myriad of reasons for its action, it is apparent from both the extrinsic facts and their prior statements that such action rested upon the denial of security clearance. My prior business connections with The Joggler Corporation and Trans-Mar, Inc. were so peripheral and inconsequential that my failure to set them forth in answer to the "business history" section of the information form provided by the New York Stock Exchange (Exhibit No. 5) was obviously [fol. 120] inadvertent. Certainly, the Exchange does not contend that it took the drastic action it did because of these omissions. If it were concerned about these omissions, it certainly could have asked me to furnish an explanation or give further information.

As to the claim that I improperly sold stock of the U. S. Hoffman Machinery Co., Inc, after agreeing not to do so, the fact is that the Securities and Exchange Commission was fully apprised of these transactions (Exhibit No. 63, letter of Goldberg, Fonville, Gump & Strauss to Regional Administrator, dated September 2, 1955; Exhibit No. 64,

letter of Regional Administrator to H. J. Silver, dated September 23, 1955; Exhibit No. 65, letter of H. J. Silver to Assistant Regional Administrator, dated April 12, 1957), and being so apprised did not report anything of a derogatory nature in answer to the standard inquiry of the NYSE (Exhibit No. 66, response of SEC to NYSE inquiry, dated July 21, 1958). Had the Exchange really harbored any doubt about the U. S. Hoffman stock transactions a specific inquiry to the SEC would have revealed all the facts. This the Exchange chose not to do. The reason for its omission is clear. It did not make such inquiry because its action was not based upon information concerning U. S. Hoffman stock transactions. So much was admitted by Walter Coleman, assistant director of the NYSE's Department of Member Firms. During his deposition of May 12, 1959, he was asked the following questions and gave the following answers:

> "Q. Did any of the reasons for the Exchange's disapproval action have to do with securities transactions?
>
> "A. Not directly. I think I explained to you in previous questioning—possibly I didn't—there were certain areas of information which were not in themselves a basis for the action, but which very possibly might have been considered had there not been, in our opinion, sufficient basis without them.
>
> [fol. 121] "Q. Are you referring to the transactions in the stock of U. S. Hoffman Manufacturing Company?
>
> "A. Yes." (*Id.*, at pp. 149-150.)

I cannot, of course, comment upon the unspecified derogatory information. Although I repeatedly asked the Exchange to apprise me of the reasons for its action and give me an opportunity to refute what can be nothing more than maliciously inspired gossip, the NYSE repeatedly refused to do so (see Exhibits No. 26, 40, 41 and 42). As the President of the NYSE replied: "While I can understand your position in wanting to know specific reasons for the recent action taken by the Exchange in connection with private wire and ticker service to your organization, I am sure you can also understand our position in declining to

furnish such details." The Chairman of the Exchange's Board of Governors said: "As a matter of long standing policy, the Exchange does not furnish detailed reasons for its action in either approving or disapproving private wires or ticker service for non-members."

The Exchange's reliance upon "faceless informers," with no charges, no confrontation, no opportunity for cross examination, and no opportunity to explain or refute in any form—is the essence of arbitrariness.

THE WITHDRAWN SERVICES.

Defendant emphasizes that quotations on unlisted securities and municipal bonds are not carried on the NYSE stock ticker service and that relatively few over-the-counter dealers have the stock ticker service. This is unquestionably true. The stock ticker service was employed by MSC, INC. primarily as an accommodation to those of MSC, INC's retail customers who desired quotations on listed securities at the same time that they sought quotations or made inquiries with respect to over-the-counter securities. The stock ticker service was not necessary for the doing of a business in over-the-counter securities. It was however desirable. Defendant agrees (Coyle Aff't. p. 12). Defendant also goes so far as to agree that private wire con-
[fol. 122] nections with NYSE member firms were desirable (but not necessary).

In support of its contention that such connections were not necessary for the doing of an over-the-counter business, the Exchange asserts that the 1959 edition of "Security Dealers of North America" lists fifty-six broker-dealers in the City of Dallas who are not member of the defendant, thirty-three of whom had no private wire connections with NYSE member firms (Coyle Aff't, p. 2). (Defendant apparently uses the term "broker dealer" as synonomous to "Member of the National Association of Securities Dealers." A numerical count of such firms in the Dallas section of the 1959 edition of "Security Dealers of North America" would so indicate.) However, the fact that a firm or individual registers as a broker-dealer with the SEC or becomes a member of the National Association of Securi-

ties Dealers does not mean that such firm or individual is engaged in the over-the-counter securities market or even that it is engaged in any securities business at all. Annexed hereto as Exhibit 67 are photostatic copies of the pertinent pages of the 1959 edition of "Security Dealers of North America."

In this connection, an examination of this directory (Exhibit No. 67) shows that at least sixteen of the thirty-three NASD members in Dallas not having private wire connections to NYSE member firms do not claim to be in either the over-the-counter, unlisted securities or general corporate securities business. They list themselves with such business descriptions as: "Dealers in Real Estate Securities & Mutual Fund Shares" (Armstrong Investment Company, p. 1239); "Dealers in Mutual Fund Shares & Bank & Insurance Stocks" (Cotter (W. R.) & Co., p. 1242); "Dealers in Mutual Fund Shares & Insurance Stocks" (Dorian & Company, p. 1246); "Insurance Companies Bought & Sold; Mergers & Negotiations Solicited for Acquisitions Through Outright Purchase or Stock Control" (Maxwell (M. B.) Associates, p. 1255); "Under-[fol. 123] writers & General Distributor of Southwestern Investors, Inc." (Southwestern Management and Research Corp., p. 1268); and "Dealers in Mutual Fund Shares" (Washington Underwriters, Inc., p. 1270). The other seventeen firms or individuals listed as members of the NASD, while listed as dealers in general or special stock or bonds, do not claim to have corporate securities trading departments. An examination of the 1959 alphabetical and classified telephone directories for the City of Dallas shows that Bulowski (Joe) Co. described as "Dealers in Stocks, Bonds & Mutual Funds" (p. 1240) has no telephone directory listing. The only listing is a residence for a Joe Bulowski at 5555 Wenonah. Rix Investment Company described as a dealer in "Stocks and Bonds" (p. 1263) has no telephone listing in either directory. Nor does its proprietor, Mary K. Rix. Similarly, A. Whitehead described as a "Dealer in Industrial Securities & Mutual Fund Shares" (p. 1271) is not listed in either directory.

The most important conclusion to be drawn from an examination of the Dallas section of the 1959 edition of

"Security Dealers of North America" is that every single "broker dealer" listed as having a trading department *also* has private wire connections with NYSE member firms (Carothers & Co., Inc., p. 1241; First Southwest Company, p. 1250; Garrett and Company, p. 1252; Hauser, Murdoch, Rippey & Co., p. 1254; Hudson (R.S.) & Co., Inc., p. 1254; Municipal Securities Company, p. 1258; Parker, Ford and Company, Inc., p. 1260; Shumate & Company, Inc., p. 1266; Underwood (R.A.) & Co., Inc., p. 1269; Walker, Austin & Waggener, p. 1270; Manney & Company, wires shown at p. 1254 under E. F. Hutton & Company and at p. 1263 under Dallas Rupe & Son, Inc.). Accordingly, defendant's contention that private wire connections to NYSE member firms are unnecessary to do an over-the-counter corporate securities *trading* business is absurd. The NYSE and its member firms know better. For example, see the advertisement of Shields & Co., an NYSE member firm, in "The [fol. 124] New York Times," May 24, 1960, p. 53, annexed hereto as Exhibit No. 68.

Defendant also contends that private wire connections with NYSE member firms were not necessary to the conduct of an over-the-counter trading business because there are other adequate and equivalent means of information and communication (Coyle Aff't, p. 11). It refers to the National Quotation Bureau sheets, the Dow-Jones ticker service and the Bell System National Teletypewriter Service. The National Quotation Bureau sheets are described by Professor Louis Loss as follows:

> "The 'inside' quotations appear in the Daily Quotation Service published by the National Quotation Bureau, Inc., a private corporation. This service—divided into stock sheets and bond sheets—contains listings for upward of 5,000 issues of stock and perhaps half as many corporate bond issues in a typical day. The service is sold only to brokers or dealers duly qualified to do business by federal and state authorities and approved by the Bureau with a view to ensuring the integrity of the sheets. Each subscriber may insert a specified number of entries. For each security listed, the sheets show the names of the in-

terested dealers, the number of shares or bonds for which prices are quoted by each dealer, and usually each dealer's bid and offer.

"More than 2,000 dealers throughout the country subscribe and report their bids and offers. The sheets are issued in three editions—the Eastern from New York, the Western from Chicago and the Pacific Coast from San Francisco—and particular securities may be listed on a given day in one or all of the editions. The listings are gathered by two o'clock of the day on which the sheets are dated, and most subscribers have the sheets by the opening of business the next [fol. 125] day.* The quotations in the sheets are not transaction prices, or even firm bids or offers which can be accepted so as to create a contract. They merely indicate a willingness on the part of the dealers inserting them to trade with other brokers or dealers within the specified limits. But dealers are expected to have a genuine interest in each security they list, with respect to both price and quantity, and those who acquire the reputation of 'backing away' from their listings soon find that they might as well not list. The fact is that dealers can usually effect transactions at prices somewhere between the bid and offer shown in the sheets. In any event, the quotations are sufficiently reliable to be accepted by the courts and the SEC as a persuasive indication (not as conclusive evidence) of the prevailing market between dealers." Loss, *Securities Regulation*, 710-711 (1951).

Professor Loss adds by footnote:

"Sometimes dealers fail to insert specific bids and offers; the price column is left blank or the symbol 'OW' or 'BW' is used for 'offer wanted' or 'bid wanted.' One or the other of these practices is followed when a firm is attempting to develop an interest in a particular security whose market has been dor-

* The combined Eastern and Western edition was mailed from Chicago or New York. It was usually received in Dallas *two* days after publication.

mant, or has a general interest at other than current prices; 'OW' or 'BW' indicates a somewhat greater readiness to do business than leaving the space entirely blank and also indicates what side of the market the firm is on. Another reason for omitting figures is that member firms are prohibited by various exchanges from making off-board bids or offers at fixed prices for securities traded on their exchange. *E.g.*, [fol. 126] N. Y. Stock Exch. Rule 623. (The sheets include issues traded on exchanges, but *listed* issues, as distinct from those admitted to unlisted trading privileges, are usually included only when the exchange volume is small.) The National Quotation Bureau requires subscribers to insert a specific price for at least five out of every ten entries submitted." (*Id.*, at p. 710, ftn. 5.)

The foregoing description makes it apparent that the information furnished by the National Quotation Bureau, Inc. was not a substitute for immediate current information as to the actual price at which various firms were willing to buy or sell unlisted securities. Such information could be gathered effectively only by obtaining comparative spot quotations from four or five different dealers over private wire connections. An actual purchase or sale might then be made at the best price. At best, the Daily Quotation Service was a guide to the approximate range in which trades might be made and an indication as to which firms were actively interested in a particular security. MSC, INC. initially subscribed to the Daily Quotation Service on June 16, 1958 and published ten to fifteen items a day therein. And, while that service was one of MSC, INC.'s available trading tools, it served an entirely different purpose than did the private wire connections.

The Dow-Jones ticker service, known in the trade as "the broad tape," is a business reporting service which defendant describes as furnishing "periodic reports daily on stock and bond activity and current items of interest to the business world" (Coyle Aff't, p. 11). While such information is useful in the sense that it keeps traders apprised of general information tending to affect security

prices, it does not furnish spot quotations which enable an over-the-counter trader to make specific trades.

The Bell System National Teletypewriter Service is one means of communicating between subscribers to the ser- [fol. 127] vice. It is actually a substitute for conventional long distance telephone communication and offers the advantage of lower toll charges than long distance telephone. It is nevertheless a costly means of obtaining quotations, whereas through private wire connections between MSC, INC. and NYSE member firms, quotations were obtained at no charge to MSC, INC. (see, *infra*, pp. 13-14). In 1959 the basic teletypewriter message charge between Dallas and New York was $1.55, between Dallas and Chicago $1.20, and between Dallas and Houston $0.75 (subject to 10% Federal Excise Tax). In addition to being a costly method of obtaining quotations, it was an inefficient one and hardly a substitute for private wire connections. When MSC, INC. wanted to obtain the comparative quotations of five over-the-counter dealers in New York City prior to February 13, 1959, a teletype message would be sent over the private telemeter wire to Straus, Blosser & McDowell at no charge to MSC, INC. In a matter of seconds the trader at Straus, Blosser & McDowell would flip five keys, obtain five quotations and immediately teletype this information back to us. When MSC, INC. wanted to obtain the same information *after February 13, 1959,* it was required to communicate separately and individually by consecutive teletype wires to each of the five over-the-counter dealers. By the time the fifth quotation had been obtained, the first quotation might have been changed by the quoting house. Moreover, these five quotations would have cost MSC, INC. a minimum of $8.53 (inclusive of Federal Excise Tax) without even resulting in an actual transaction. When trading profits are measured in eighths of a point, such a competitive disadvantage is difficult to overcome.

The Facts of Damage

Defendant has apparently misread plaintiffs' moving affidavits. At p. 10 of the affidavit of Harry F. Reed it was stated that "we attempted to expand our retail customer business in over-the-counter securities. By intensive effort [fol. 128] we were able to develop a slight increase in the

volume of such business (from $1,213,000 in the six months before February, 1959 to $1,396,000 in the six-month period after February, 1959)." Defendant has taken this to mean that after February 13, 1959 MSC, INC. was able to increase the volume of its trading activities in over-the-counter securities in spite of the unavailability of private wire connections with NYSE member firms. This increase, however, as Mr. Reed's affidavit makes clear, was only in *retail* transactions and does not reflect or refer to MSC, INC.'s corporate securities *trading or wholesale* activities. The fact is that the volume of our *retail* business in over-the-counter securities was generated by salesmen in direct contact with individual customers. As is customary in doing an over-the-counter business, we acted as principal rather than broker in entering into transactions with individual customers. The private wire connections with member firms were important to our retail over-the-counter business only to the extent that such connections permitted us to buy and sell, for and from our inventory, at the best possible price. The absence of private wire connections with member firms did not affect our gross retail volume; it affected only our profits from retail over-the-counter operations.

With respect to volume of *trading* activity in over-the-counter corporate securities, as I have already pointed out in my prior affidavit at pp. 17-18, our volume declined precipitously after February 13, 1959. In the seven months before February, 1959, MSC, INC.'s volume of trades in over-the-counter corporate securities was approximately $6,850,000, whereas in the seven months subsequent to February, 1959, this figure had shrunk to approximately $3,990,000.

Prior to February 13, 1959, MSC paid the Southwestern Bell Telephone Company $6.00 per month for the private wire connection to the Bond Department of Dallas Union Securities and $5.00 per month for the private wire connec-
[fol. 129] tion to the Bond Department of Rauscher, Pierce & Co., Inc. However, MSC, INC. paid nothing for its private wire connections to NYSE member firms in Dallas. *After* February 13, 1959, in an effort to diminish the amount of time required for obtaining quotations over

conventional telephone lines, MSC, INC. installed an automatic dialing system which eliminated the time lapse involved in manual dialing (Reed Aff't, p. 6). This electronic dialing device, called "Dialaphone," was installed on August 4, 1959 by the Southwestern Bell Telephone Company at an installation cost of $20.00 and a monthly carrying charge of $6.88, including Federal Excise Tax. Annexed hereto as Exhibit No. 69 is a photostatic copy of the bill of the Southwestern Bell Telephone Company for "Dialaphone" installation and service. This was an item of expense attributable solely to the withdrawal of private wire connections to NYSE member firms, and to no other possible cause.

In addition, *prior* to February 13, 1959 MSC, INC. enjoyed the use of a direct private wire connection to an NYSE member firm in New York at no charge to itself, *i.e.*, the private telemeter wire paid for by Straus, Blosser & McDowell (see Reed Aff't, April 20, 1960, p. 3). *After* February 13, 1959 MSC, INC. expended $7.10 in long distance telephone communications to Straus, Blosser & McDowell's New York office—communications which otherwise would have been transmitted over the Straus, Blosser & McDowell telemeter wire. Moreover, the discontinuance of the private telemeter wire between MSC, INC. and Straus, Blosser & McDowell's office in New York City ended the arrangement under which MSC, INC. at no toll cost to itself obtained quotations from or entered into transactions with firms with whom Straus, Blosser & McDowell had private wire connections. *After* February 13, 1959, when MSC, INC. wanted to make a transaction with such houses, it was required to use the Bell System National Teletypewriter Service and pay a per message charge for each communication. For the period February 13, 1959 through [fol. 130] June 15, 1959, the teletype message charges for communications with firms from whom MSC, INC. had previously communicated through its wire to Straus, Blosser & McDowell cost MSC, INC. a total of $202.60, including Federal Excise Tax. Annexed hereto as Exhibit No. 70 is a list of the charges incurred during that period. On June 15, 1959, after having been unsuccessful in negotiating an arrangement with Eastern Securities Company (see H. J.

Silver Aff't, April 19, 1960, pp. 21-22), MSC, INC. completed arrangements for a private telemeter wire between its office in Dallas and Hardy & Hardy's office in New York. Hardy & Hardy, not a member of the NYSE, paid for the entire cost of this wire and thereafter MSC, INC. was better able to obtain quotations from and enter into transactions with other New York over-the-counter dealers.

MSC's Profits

With respect to MSC's profits from municipal bond operations, defendant states that in 1957 MSC sustained an operating loss of $52,000, in 1958 an operating loss of $178,000 and in 1959 an operating loss of $186,000 (Coyle Aff't, p. 12). Obviously, defendant can take little comfort from MSC's operating loss in 1959 for virtually all of the year's business was conducted after defendant had taken its action of February 12, 1959. Moreover, an analytical examination of MSC's audited Statement of Income for the years 1957 and 1958 demonstrates that MSC earned money over the two-year period ending December 31, 1958. Annexed hereto as Exhibit No. 71 is the comparative statement of income for years ending December 31, 1957 and December 31, 1958 as prepared by Peat, Marwick, Mitchell & Co. The defendant has failed to take note of the substantial items of "Other income" reported for 1957 in the amount of $52,167 and in 1958 in the amount of $163,837. Both of these items were of course subject to reduction by "other charges—interest expense" in the amount of $9,820 [fol. 131] and $18,733. Moreover, the adjustment shown for inventory values was a bookkeeping entry not reflective of cash flow. Actual gain or loss could only be realized when bonds held in inventory were actually sold, and our strong capital position enabled us to hold bonds for a better market. Further in each of the years 1957 and 1958 I drew $15,000 from the proprietorship which was denominated as "Proprietor's Salary." This item in a single proprietorship is of course an element of income.

However, the true impact of defendant's action upon MSC's business is measurable in terms of the decrease in the total dollar amount of MSC's transactions. Volume

decreased by 42% in 1959 from the volume achieved in 1958. (See H. J. Silver Aff't, April 19, 1960, p. 20, for dollar figures.)

The Relief Sought by MSC, INC.

It should be noted that plaintiff MSC, INC. does not seek preliminary injunctive relief, but only partial summary judgment on the issue of liability and summary judgment for permanent injunctive relief.

As I stated in my moving affidavit, MSC, INC. has ceased to function as an operating business organization. It has no employees and retains only its corporate existence, its Texas license as a securities dealer, its broker-dealer registration with the Securities and Exchange Commission, its membership in the National Association of Securities Dealers, and certain unliquidated assets. If MSC, INC. were to be granted a preliminary, rather than a permanent injunction, I would not and could not attempt to re-establish it as a functioning organization. First of all, employees would be unwilling to return to work on a temporary basis accorded by a preliminary decree. Secondly, as a practical matter, I could not undertake the substantial financial investment which is required to restore MSC, INC. as an operating organization under such circum-
[fol. 132] stances. On the other hand, if MSC, INC. were to be awarded a permanent injunction, employees could be offered employment on a more permanent basis and the otherwise highly speculative financial investment necessary to place MSC, INC. on an active and profitable footing could be undertaken with much less risk of loss.

Harold J. Silver

Sworn to before me this 26th day of May, 1960.

Arthur J. Galligan, Notary Public, State of New York, No. 31-1364450, Qualified in New York County, Commission Expires March 30, 1961.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY AFFIDAVIT OF A. DONALD MACKINNON

State of New York,
County of New York, ss.:

A. Donald MacKinnon, being duly sworn, says:

I have read the affidavit of Harold J. Silver, sworn to May 26, 1960, and make this affidavit in reply.

Mr. Silver purports to have far more knowledge of the affairs of Municipal Securities Company (herein "Municipal") and Municipal Securities Company, Inc. (herein [fol. 133] "Municipal, Inc.") than at the time his deposition was taken. He then disavowed knowledge of many pertinent facts, testified that D. Edward Walton was primarily in charge of the affairs of Municipal, that Walton was also a vice president and a director of Municipal, Inc. and that management of the affairs of Municipal, Inc. was largely entrusted to Harry F. Reed. He testified that Walton was discharged by Municipal on October 19, 1959, and that Reed is now with another Dallas brokerage firm. Their testimony is needed in order to develop the full facts.

Mr. Silver concedes that Municipal, Inc. failed to list either the Joggler Corporation or Trans-Mar, Inc. in the "Information to be furnished by non-member for private wire connections or ticker service" (Moving Papers, Ex. 5). Plaintiffs' position is, in effect, that token compliance was sufficient and that defendant and not the applicant was required to see that the requested information was furnished.

Although Municipal, Inc. received only temporary approval for the private wire connections and the stock ticker service, plaintiffs contend, in effect, that the temporary approval was in fact final approval. They ignore Municipal, Inc.'s express agreement that the private wire connections and the stock ticker service could be discontinued whenever defendant withdrew approval (Moving Papers, Ex. 4, p. 2). They thus contend that defendant acted at its peril in granting temporary approval and that

defendant's conditional agreement with Municipal, Inc. was in fact an agreement without any conditions.

Mr. Silver concedes that both he and Mrs. Silver were denied security clearance by the Defense Department and that all of their efforts to have the suspension lifted have met with no success. Under the circumstances, defendant had the right to rely on the Defense Department's action. Among other things, the Silvers were charged with behavior, activities and associations tending to show that they were not reliable and trustworthy. Moreover, Mrs. Silver [fol. 134] admitted that the Silvers might have done wrong in concealing the stock ownership of Intercontinental Manufacturing Company. To use her own words, "It might have been wrong but, certainly, I did not mean to do any wrong by doing it that way."

We submit that defendant acted reasonably in withdrawing the temporary approval for the private wire connections and the stock ticker service for the following reasons:

1. Defendant had not approved Municipal's private wire connections;

2. Municipal, Inc. had agreed on receiving temporary approval that the private wire connections and the stock ticker service should be discontinued whenever defendant withdrew approval;

3. Municipal, Inc. was requested to furnish a list of Silver's corporate connections for a ten-year period and failed to do so;

4. The denial of security clearance by the Defense Department on charges, among others, that the Silvers' behavior, activities and associations showed that they were not reliable and trustworthy; and

5. The concession that the Silvers might have done wrong in concealing the stock ownership of Intercontinental Manufacturing Company and the attempt to excuse the wrong by saying "I did not mean to do any wrong by doing it that way."

The action of defendant, far from being arbitrary, was taken only after careful consideration of the results of an investigation conducted by experienced, independent agen-

cies. Subsequent reports confirmed the results of the initial investigation and left no doubt as to the truth of the charges made against the Silvers. Obviously, defendant could not possibly conduct a public hearing every time it withdraws temporary approval of the use of its facilities. This is [fol. 135] especially true in the case of a non-member who is not bound by the procedures applicable to members.

Defendant believes the facts before the Court, without more, demonstrate that its action in withdrawing the temporary approval of the private wire connections and the stock ticker service was reasonable. Defendant will not submit on this motion the additional information developed on the investigations. Plaintiffs' counsel stated in open court that suit would be instituted against the parties supplying such information. The persons who supplied the information did so in confidence and not with the expectation that they would be called upon to engage in litigation.

The motions should be denied. They are lacking in merit for all of the reasons advanced in our opposing papers and memoranda.

A. Donald MacKinnon

Sworn to before me this 6th day of June, 1960.

Louis A. Wolf, Notary Public, State of New York, No. 30-9723500, Qualified in Nassau County, Certificate filed in New York County, Term Expires March 30, 1962.

(Seal)

[fol. 136]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL AFFIDAVIT OF HARRY F. REED

State of Texas,
County of Dallas, ss.:

Harry F. Reed, being duly sworn, deposes and says:

I submit this affidavit in reply to the affidavit of A. Donald MacKinnon, verified the 6th day of June, 1960.

At the outset I would like to state that, although Harold J. Silver did not personally conduct all of the business affairs of MSC, INC., he was actively engaged in the business on a managerial and policy leval. Thus, while I conducted day-to-day trading activities, Mr. Silver dealt with such problems as financing, branch office expansion, and so forth. I have read Mr. Silver's affidavit of May 26, 1960 and insofar as it relates to the activities of MSC, INC. (*id.*, at pp. 5-14), it is, from my own knowledge, completely accurate. More particularly, the communication time problem caused by the withdrawal of our private wire connections with NYSE member firms was the subject of frequent conferences between Mr. Silver and me after February 13, 1959. He personally consulted with telephone company representatives and arranged for the Dialaphone service referred to in his affidavit of May 26, 1960 (*id.*, at p. 13).

Although Mr. Silver, of course, did not personally transmit the teletype messages set forth in Exhibit No. 70, he was aware of the cost factors involved in the use of the Bell System National Teletypewriter Service, and we jointly compiled the list of messages and transactions set forth in Exhibit No. 70. The Bell System Service is a supplemental communication facility used in dealing in over-the-counter securities, and is an expensive tool when compared to [fol. 137] private wire facilities. Prior to February 13, 1959, MSC, INC. used toll teletype messages only when communicating with securities dealers who were not available through the vast private wire network maintained by Straus, Blosser & McDowell and other NYSE members with whom MSC, INC. had free, direct and instantaneous communication. After February 13, 1959, our severance from this network made necessary more frequent resort to toll teletype message communications. Every transaction reported in Exhibit No. 70 would have been conducted through the private telemeter wire paid for by Straus, Blosser & McDowell had such wire not been discontinued by order of the Exchange. MSC, INC. would not have incurred any of the toll charges set forth in Exhibit No. 70 had the Straus, Blosser & McDowell wire remained available to it. In addition, after February 13, 1959, I made two long distance telephone calls to Straus, Blosser

& McDowell on MSC, INC. business. If the private telemeter wire had not been discontinued, these communications would have been transmitted over that wire and the telephone charges of $7.10 would not have been incurred.

Defendant asserts that MSC, INC. was not in competition with NYSE member firms with whom it had private wire connections. But a share of corporate stock is not a unique property available only through one source and no other. For example, a securities dealer could purchase 100 shares of Delhi-Taylor from Merrill Lynch, Pierce, Fenner & Smith as well as from MSC, INC. It would make the purchase from the firm offering the best price. The private wire network provided MSC, INC. with the information necessary to be in competition with NYSE member firms and other dealers in over-the-counter securities. In further illustration of the competitive situation, the Court is respectfully referred to the Dallas section of the 1959 edition of "Security Dealers of North America" (Exhibit No. 67, see advertisements of Dallas, Rupe & Son, Inc., p. 1239; Dallas Union Securities Co., Inc., p. 1243; Eppler, Guerin & [fol. 138] Turner, Inc., p. 1247; Municipal Securities Company, p. 1259; Rauscher, Pierce & Co., Inc., p. 1261; Sanders & Company, p. 1264; Schneider, Bernet & Hickman, Inc., p. 1265). In soliciting the business of other securities dealers, Eppler, Guerin & Turner, Inc., an NYSE member firm, describes itself as "The Firm that *Knows* the Southwest." Rauscher, Pierce & Co., Inc., another NYSE member firm, declares: "Check with Us If It's in the Southwest." Municipal Securities Company states: "Specialists in Securities of the Southwest."

I have read the affidavit of Frank J. Coyle, verified the 23rd day of May, 1960. At pages 11 and 13 of that affidavit, Mr. Coyle, misreading my prior affidavit, asserts that MSC, INC.'s over-the-counter business actually increased after February 13, 1959. This is not true. What I did say was that through intensive efforts we brought about a small increase in our retail business in over-the-counter securities, but that our trading activity in over-the-counter securities (80% of our over-the-counter business) substantially declined. I have been informed that during oral argument defendant's counsel reiterated the misstatement, this

time referring to an increase in "retail trading" activity. There is nothing in the securities business which can be described as "retail trading." The words are mutually contradictory. The figures set forth at pp. 17-18 of Mr. Silver's affidavit of April 19, 1960 are true and accurate. In the seven months before February, 1959, MSC, INC.'s trading volume in over-the-counter corporate securities was approximately $6,850,000. In the seven months after the NYSE ordered the discontinuance of the private wire connections between MSC, INC. and NYSE member firms, that volume had shrunk to $3,990,000.

Harry F. Reed

Sworn to before me this 8th day of June, 1960.

Trudy Clark, Notary Public in and for Dallas County, Texas.

[fol. 139]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM DEPOSITION OF HAROLD J. SILVER

Examination by Mr. MacKinnon:

Q. Will you state your name, address, business and business address, Mr. Silver?

A. My name is Harold J. Silver. I reside at 6815 Hunters Glen Road, Dallas, Texas.

My business is Municipal Securities Company, investment bankers, at 600 First National Bank Building, Dallas, Texas.

Q. Is Municipal Securities Company, Inc. a corporation?

A. Municipal Securities Company, Inc. is a corporation.

Q. Can you tell me what State it was organized in?

A. In the State of Texas.

Q. Who are the officers thereof?

A. At this time the officers are Harold J. Silver, president; Evelyn B. Silver, secretary and treasurer, Mr. Louis Stayart, vice-president.

Q. Are those the only officers?

A. I believe those are the only officers.

Q. Who were the officers in 1958 as distinct from the present time?

A. There was a gentleman by the name of D. Edward Walton, who was a vice-president.

Q. What is Municipal Securities Company?

A. A proprietorship.

Q. Who was the owner thereof?

A. I am.

Q. And were you during 1958 and 1959?

A. I have been the owner since inception.

Q. What was the date of inception?

A. September 1, 1956.

Q. What was the nature of the business of Municipal Securities Company?

A. They act as underwriters, dealers and distributors of municipal bonds.

Q. Has Evelyn B. Silver any relationship to Municipal Securities Company?

A. She is my wife.

Q. I understand that.

A. And under the community property laws in the State of Texas, I presume she probably owns half of it.

[fol. 140] Q. Does Municipal Securities Company continue to do business?

A. At this time?

Q. Yes.

A. Yes.

Q. I am not now talking about the corporation, I am talking about Municipal Securities Company as distinct from Municipal Securities Company, Inc. Both of them are doing business?

A. No, that is not true.

Q. I am trying to find out the fact. When did Municipal Securities Company cease doing business?

A. Municipal Securities Company, the proprietorship, is still doing business. Municipal Securities Company, Inc., the corporation, has not done any business, I would say, since September of 1959, when Mr. Harry Reed, who was

managing it, resigned because it was impossible for him to continue doing business under the circumstances.

• • • • • • •

Q. When, for the first time, did you have any private wire facilities with any member firms of the New York Stock Exchange?

Mr. Dickstein: When you say you, you are referring to any of the plaintiffs?

Q. I am referring to Municipal Securities Company, Municipal Securities, Inc. and I would like the witness to specify which.

A. Probably in September 1956 or shortly thereafter there was a private wire between Municipal Securities Company and Merrill Lynch, Pierce, Fenner & Smith in Dallas.

Q. Did you make any application to the New York Stock Exchange for the approval of that wire service?

A. We did not. We assumed that whatever was necessary would be done by Merrill Lynch.

Q. But you did nothing?

A. We did nothing. We were not aware of the fact that we had to do anything.

Q. When did you learn that for the first time?

A. When Harry Reed came with Municipal Securities [fol. 141] Company, Inc., he seemed to know more about the corporate end of the business and he handled the details in connection with the applications for the continuous stock quotation service and for any of the private wires that came into Municipal Securities Company, Inc.

Q. Can you fix the date when Mr. Reed came with you?

A. Mr. Reed came the end of May or the beginning of June 1958 is when Mr. Reed came with Municipal.

Q. Had you made any inquiries as to whether or not it was necessary to receive New York Stock Exchange approval prior to that date for the connection of a private wire with a member firm?

A. I personally had not made any inquiries.

Q. Had you given any instructions to any of your staff to make such inquiries?

A. And I had not given any instructions to any of my staff to make such inquiries.

Q. When you made whatever connection you made with Merrill Lynch, I think you stated, was that pursuant to an oral or a written agreement?

A. With whom?

Q. Between Municipal Securities and I think this is not the corporation, if I understand your testimony correctly.

A. That is right.

Q. And Merrill Lynch?

A. I believe what probably happened is that Mr. Walton, who was in charge of the Municipal Department of Municipal Securities Company, made the arrangements over the telephone with Merrill Lynch and, at the same time, I think we had a private wire to several different banks in town. I don't recall the others, but perhaps my records would disclose it, if you wish it.

Q. I am only interested in the member firms. I am not interested in any banks. I am interested in member firms.

A. Rauscher, Pierce was another one that had a wire to Municipal Securities Company.

Q. As of what time?

A. This was back in, I would say, probably in late 1956 or 1957. I couldn't give you the exact date, but this was to the company and this would be prior. Now, how much prior I couldn't tell you, prior to the installation of the [fol. 142] wires to the corporation, which were applied for under Mr. Reed's direction.

Q. Rauscher—

A. Dallas Union Securities.

Q. With respect to Rauscher, did you apply for permission?

A. I do not recall whether we did or not.

Q. Have you any documents that show that you made any application for private wire tie-up with that firm?

A. I don't believe we have.

Mr. Dickstein: By application you mean application to the New York Stock Exchange?

Q. To the New York Stock Exchange.

A. I don't recall signing any.

Q. Did you make any inquiry as to how you were to get the private wire with Rauscher?

A. I personally did not.

Q. Who handled the matter?

A. It was undoubtedly handled by one of the men in the office.

Q. Do you recall what man?

A. I would not know.

Q. What is the third one?

A. The third one is Dallas Union Securities. Are they members, yes, it says so.

Mr. Dickstein: Dallas Union Securities Company is a member firm of the New York Stock Exchange.

Mr. MacKinnon: When did it become such?

The Witness: I wouldn't know.

Q. Did it become such in 1956, you say you had a tie-up with them in 1956?

A. I am not sure it was 1956, it may have been subsequent to that time. I know it was prior to the formation of the corporation.

Q. Let me get myself straight on the record. What was the earliest private wire connection Municipal Securities Company had with any member firm of the New York Stock Exchange?

A. Without further reference to other records—

Q. Refer to any records you have.

A. I don't think I have them here. I would say it would be sometime in late 1956, probably.

[fol. 143] Q. That would be Merrill Lynch?

A. I think it was Merrill Lynch and Rauscher, Pierce.

Q. In connection with that tie-up, wire tie-up, you did not file an application?

A. I do not recall that we did.

Q. Who was the second or what was the second wire house that you tied up with?

Mr. Dickstein: You mean the third, Mr. MacKinnon?

Q. No, the second. We have Merrill Lynch now and we are trying to reorient this thing.

A. Rauscher, Pierce and that may have been about the same time.

Q. And did you make any application to the New York Stock Exchange for the tie-up of a private wire to that firm?

A. No, sir, not to my recollection.

Q. What was the third query?

A. The one to Dallas Union Securities was installed sometime in May of 1958, approximately.

Q. With what outfit, that is was it with Municipal Securities Inc. or Municipal Securities Company?

A. This was to the Municipal Securities Company.

Q. Did you apply to the New York Stock Exchange for permission to have that private wire connected with Municipal Securities Company?

A. Not to my recollection.

Q. Did you have any other tie-ups, private wires with member firms of the New York Stock Exchange prior to the date that you did make application and when I say you, I am speaking now of Municipal Service Company, Inc.

A. You are talking about the corporation?

Q. That is right.

A. The corporation had no tie-ups with any member firm except those that were the result of the application.

Q. Did the Municipal Securities Company have any other tie-ups with member firms prior to the time that the application was filed by the corporation, Municipal Secur-
[fol. 144] ities Corporation, with the New York Stock Exchange?

A. None other than I can see here.

Q. That is the three that you have mentioned?

A. Yes.

Q. In connection with those three tie-ups, no application was made by Municipal Securities to the best of your knowledge?

A. That is correct.

Q. To the New York Stock Exchange; is that correct?

A. That is correct.

• • • • • • •

Q. When did Municipal Securities Company, Inc. discontinue doing business?

A. In September 1959, I would say about September of 1959.

Q. September of 1959?

A. Yes, sir.

Q. At the time that you made application on behalf of Municipal Securities, Inc. for private wire and continuous ticker quotes to the New York Stock Exchange, was Municipal Securities Company doing business?

A. Municipal Securities Company, the proprietorship, yes, sir.

Q. Did it at that time have private wires with Merrill Lynch, Rauscher and Dallas Union?

A. Yes, sir.

Q. How intimately were you connected with the affairs of Municipal Securities Company; was it a daily chore of yours or was it something that you gave little or no attention to?

A. It was not a daily chore of mine.

Q. Who ran its affairs?

A. At that time, a Mr. Walton.

Q. What is his full name, please?

A. D. Edward Walton. I think his first name is Dennis, was primarily in charge of the affairs of Municipal Securities Company. Assisting him was Mr. Stayart and Mr. Hagberg.

Q. Were they all employees of the Municipal Securities Company?

A. They were all employees of Municipal Securities Company, the proprietorship.

Q. When Municipal Securities Company, Inc. was organized, were you devoting more time to the securities [fol. 145] business?

A. I devoted more time to the securities business with the organization of the corporation.

Q. Will you fix that date, please?

Mr. Dickstein: Are you asking for an actual date of incorporation?

Mr. MacKinnon: Yes, when he started going to work, I take it.

A. Approximately June 1958.

Q. Prior to the organization of Municipal Securities Company, Inc., was Mrs. Silver, Evelyn B. Silver, engaged in the activities of Municipal Securities Company?

A. She was engaged in the activities of Municipal Securities Company in terms of activities other than the buying and selling of municipal bonds. Municipal Securities Company, in addition to buying or selling municipal bonds and underwriting them, was also interested in any other situation where it could function as an investment banker.

Q. That is loaning funds?

A. Either lending funds or securing funds for people acting as an intermediary.

Q. Mrs. Silver was engaged in that type of activity?

A. She was engaged in that type of activity, but did not do anything with the municipal bond business, since she knows nothing about it.

Q. Was she paid a salary with Municipal Service Company?

A. She was paid a—there was a check drawn every 15th and 30th to her, but it went into our joint account and we didn't consider that as a salary to her or as a salary to me, it was a drawing, as you know in the case of a proprietorship, you don't pay yourself salary, to the proprietors.

Q. Nevertheless, she did receive a check on the 1st and 15th of the month?

A. That is right.

Q. From Municipal Securities Company?

A. That is correct.

[fol. 146] Q. What did she do for that salary?

Mr. Dickstein: Objection as to form, for the check which she drew.

A. It was not a salary, as I explained to you.

Q. What did she do for the proceeds of the check?

A. She didn't necessarily do it for the check. She would have done it had she not received the check.

Q. What did she do, she carried on negotiations?

A. She would carry on negotiations.

Q. Did she, during this period?

A. Yes, she did.

Q. Did she originate business?

A. She tried to.

Q. When the corporation was organized, which I think we ved as sometime in June of 1958, Mrs. Silver became secretary-treasurer?

A. Yes, sir.

Q. What functions did she carry on in Municipal Securities Company, Inc.?

A. None.

Q. She did nothing?

A. She did nothing. She may have signed a check if everybody else who could sign checks was not around to sign it, but she did nothing for Municipal Securities Company, Inc.

Q. Was she paid a salary?

A. She was not paid a salary.

Q. Who were the officers of Municipal Securities, Inc. aside from yourself?

A. Mr. D. Edward Walton was a vice-president, Mr. Stayart was a vice-president and assistant secretary, I believe. I do not recall if Mr. Hagberg was a vice-president or not. I would have to have the corporate records, and Evelyn B. Silver was secretary-treasurer.

Q. Was she also a director?

A. She was also a director. There were three directors.

Q. Who were they?

A. Mr. Silver, Mrs. Silver and Mr. Walton. May I add this: Mr. Stayart did not become an officer until subsequent to these applications and neither did Mr. Hagberg.

[fol. 147] Q. Had you been trained in the securities business?

A. No, sir.

Q. Prior to the organization of Municipal Securities Company?

A. No, I had not been trained in the business.

Q. You had not?

A. No.

Q. At the time that you executed Defendant's Exhibits 4 and 6 for identification, did you have any discussion with anyone as to the necessity of applications being made to the New York Stock Exchange?

A. At the time this was done, Mr. Reed advised me that this was necessary and that he would be taking care of the necessary details of the applications to the New York Stock Exchange.

Q. Is that the first time you learned that it would be necessary to apply or make formal application for continuous ticker service?

A. That is true.

Q. Is the same true with respect to private wire connection?

A. That is true.

Q. At or about that time did you make application to the New York Stock Exchange for approval of the private wire connections which you say existed between Municipal Service Company, Merrill Lynch, Rauscher and Dallas Union?

A. No, I did not. I assumed that whatever approval was necessary had been obtained by the other parties.

Q. Other parties of what?

A. To the wire.

Q. What do you mean when you say other parties?

A. Such as Rauscher, Pierce, Dallas Union and Merrill Lynch. I assume if there had been approval that was necessary, they would have obtained it.

Q. When you executed Defendant's Exhibit 6, you knew you were making application, did you not, for approval of private wires to member firms?

A. That is true.

Q. Do you notice in the list of private wire connections for which Municipal Securities Company, Inc. was asking [fol. 148] approval was Rauscher, Dallas Union and Merrill Lynch?

A. Yes, sir.

Q. Weren't you apprised by that fact that it was necessary to make application for private wire approval?

A. That did not necessarily follow in my mind.

Q. It did not?

A. No.

Q. Did you think that only because Municipal Securities Company was a corporation that you had to apply to the New York Stock Exchange?

A. No, I did not think that. In fact, I did not try to break it as to this is the reason or that is the reason.

Q. Why did you believe it necessary to execute Defendant's Exhibit 6 on behalf of Municipal Securities Company, Inc. when you had not executed a similar application for the sole proprietorship, Municipal Securities Company?

A. Because I was so advised by Mr. Reed, that this was necessary to be executed to get the wire service and to arrange for the private wires between the other member concerns and ourselves.

Q. Did you bring up with Mr. Reed the fact that you had not applied for a private wire connection on behalf of Municipal Securities Company, the sole proprietorship?

A. No, I did not bring it up and, in fact, I did not even connect the two. It didn't ring a bell to me that we had not applied several years before. The two just did not line up side by side.

* * * * * * *

Q. Had Mr. Reed been an employee of Municipal Securities Company, the sole proprietorship?

A. No, sir.

Q. He had not?

A. No, sir.

Q. Did you tell Mr. Reed that Municipal Securities Company, the sole proprietorship, had not filed an application with the New York Stock Exchange?

A. I did not tell him that. He did not ask me that—

[fol. 149] Q. And you didn't tell him?

A. And it did not occur to me to tell him.

Q. Whether it occurred to you or not, you did not tell him?

A. And I did not tell him.

Q. Did you discuss that matter with Mrs. Silver at all?

A. No, sir.

Q. Did you discuss it with any other officer of Municipal Securities, Inc.?

A. When you say that matter—

Q. The fact that you were applying for Municipal Securities Company, Inc. and you had not made an application for Municipal Securities Company, the sole proprietorship.

A. As I stated before, the fact that we had not made an application before and we were making one now was not connected at all in my mind and the matter was not discussed with anybody.

Q. Did you dictate the material that is found in Defendant's Exhibit 6 and 4, including the schedules or documents thereto annexed?

A. On Schedule 4 the front page was filled in by one of the girls, since this information was in the file. I furnished the information with reference to Mr. Harold J. Silver and Evelyn B. Silver and Mr. Walton dictated this to the girl.

Q. That is the matter relating to himself?

A. Was dictated by himself.

Q. Did you read Defendant's Exhibit 4 at the time you signed it?

A. Yes, sir.

Q. Turn to the next document, Defendant's Exhibit 6. Did you furnish or dictate any of that material?

A. No, I did not.

Q. How about the schedule annexed?

A. I did not check it since whoever typed it should have been in a better position to know whether it was correct rather than myself.

Q. You were signing the application, were you not?

A. That is true, sir.

[fol. 150] Q. You wanted that schedule to certify the true facts, did you not?

A. Yes, sir.

Q. But you didn't take the time to check it; is that correct?

A. I did not check it, sir.

Q. Did you read it before you signed it?

A. I do not recall whether I did.

Q. Did you have Mrs. Silver read either or both Defendant's Exhibits 4 or 6 at the time you signed them?

A. I did not.

Q. Do you know whether she read either or both Defendant's Exhibits 4 and 6 prior to the time you signed them or at the time you signed them?

A. I do not believe she did.

Q. My question is do you know.

A. To my knowledge, she did not read them.

Q. Mr. Silver, in paragraph Eleventh of your complaint you allege:

> "In order to properly conduct its business and provide necessary and essential services for itself and its customers, said plaintiff required facilities by means of which said plaintiff Municipal and its customers could be apprised and informed as to the latest quotations of securities listed on the defendant, New York Stock Exchange, and by means of which said plaintiff, Municipal, and its customers could purchase and sell securities listed on said defendant, New York Stock Exchange, on which quotations had been so obtained."

Do you note that?

* * * * * * *

A. Yes.

[fol. 151] Q. Now then, was Municipal Securities Company, Inc. at that time a member of the National Association of Securities Dealers?

A. Yes, sir.

Q. When had it become such?

* * * * * * *

A. On July 1, 1958 we received approval of the application of the corporation to become a member of the NASD.

Q. How long did you continue as a member of the National Association of Securities Dealers?

A. The corporation is still a member of the NASD.

Q. Is the corporation functioning today?

A. The corporation is in existence today, but is not doing any business.

Q. Does it maintain its membership in the National Association of Securities Dealers?

A. Yes, it does.

Q. Has it maintained its membership for the year 1959?

A. It paid it at the beginning of 1959.

Q. Did it pay it for the beginning of 1960?

A. If it was presented with a bill, it probably paid it.

Q. So to that extent it is doing business; is that correct?

A. To the extent that it is a member of the NASD, if you call that doing business—

Mr. Dickstein: It speaks for itself.

Mr. MacKinnon: What speaks for itself?

Mr. Dickstein: It is and continues to be a member of the NASD. Whether this constitutes doing business or not,—

Q. Do you accept your counsel's statement?

Mr. Dickstein: May I complete the statement? Whether it constitutes doing business or not, I don't believe Mr. Silver can say.

The Witness: I accept that statement.

[fol. 152] Q. Is Municipal Securities, Inc. a member of any other association of securities dealers?

A. I do not believe so.

Q. Do you know whether or not Municipal Securities Company was a member of the National Association of Securities Dealers?

A. Yes, Municipal Securities Company, the proprietorship, is a member of the NASD. Also a member of the Investment Bankers Association of America.

Q. When did it become a member of the National Association of Securities Dealers?

A. Towards the end of 1955 Intercontinental Securities Company, which was a sole proprietorship, applied and became a member of the NASD. On September 1, 1956, when Municipal Securities Company was formed or, in effect, the name was changed, the membership of Intercontinental Securities Company was transferred to Municipal Securities Company.

Q. That was a change in name?

A. In effect it was a change of name, yes.

Q. What had been the business of Intercontinental Securities Company?

A. Similar to that of Municipal Securities Company, except that it was on an extremely small scale while I was looking for proper personnel to employ.

Q. Was that a sole proprietorship?

A. Also a sole proprietorship.

Q. When was that established?

A. I would say in August 1955, probably.

Q. That is your best recollection?

A. Yes, that is my best recollection.

Q. You allege in paragraph Thirteenth of your complaint:

"Thereafter, and on or about June 25, 1958, the plaintiff, Municipal, was notified by the defendant, New York Stock Exchange, that its application for continuous stock quotations service supplied by ticker had been approved, [fol. 153] and thereafter, there was installed in the offices of the said plaintiff, such stock quotations service."

Q. Did you tell you attorney that?

A. In those specific words, no.

Q. Did you tell him that you had received approval?

A. I turned over the file to him.

Q. I show you Defendant's Exhibit 5 for identification, and I ask you whether there is anything in that letter that the application had been approved or whether it says it is temporarily approved pending further investigation.

A. To quote the letter, "It has been temporarily approved pending further processing."

Q. On or about June what is the date?

A. June 25, 1958.

Q. You were apprised of that fact, were you not?

A. That is correct.

Q. Did you furnish a copy of that letter to your counsel at the time that this complaint was prepared?

A. I presume I did.

Q. Did you, at the time that you read it, call his attention to the fact that he had misstated the facts in paragraph Thirteenth?

A. I did not believe he had misstated the facts.

Q. You did not?

A. No.

Q. You believed you had received approval?

A. Yes, I believed I had received approval.

Q. Despite the fact that it was temporary pending investigation?

A. It says temporary, I thought the thing had been approved.

Q. Did you discuss Defendant's Exhibit 5 for identification with Mrs. Silver?

A. No, sir.

Q. Did you discuss it with any other officer of Municipal, the corporation?

A. I don't believe that letter was discussed with any other officer of the corporation. I don't believe it was handled other than in a routine manner, it came in and was [fol. 154] put in a file. There didn't appear to be anything that required discussion.

Q. In any event, you didn't discuss it?

A. No, sir.

Q. Did you receive a letter from the New York Stock Exchange advising you that the Exchange had given temporary approval pending further processing of your connections with the member firms listed on the page attached to the application for private wire service, Defendant's Exhibit 6?

Mr. Dickstein: A separate letter referring to private wire connections, is that what we are talking about?

I don't see one here. Do you have the date of such a letter, Mr. MacKinnon?

Mr. MacKinnon: It is at or about the same date.

The Witness: May I look at it?

Mr. MacKinnon: I haven't got it here, but I understand there was such a letter.

Mr. Dickstein: We have no copy of a letter dated on or about June 25, 1958 which purports to approve private wire connections.

Mr. MacKinnon: There isn't any such letter, as I understand it. It is temporary approval.

Mr. Dickstein: Approval permanently or temporarily.

By Mr. MacKinnon:

Q. I show you Defendant's Exhibit 7 for identification, Mr. Silver, and I ask you whether on receipt of that letter, the original of that letter, you learned for the first time

that Municipal had been given temporary approval for a continuous stock quotation service at or about June 25, 1958.

A. I did not distinguish between temporary, permanent [fol. 155] or any other kind of approval and in reading this letter, the thing that hit me was not the question whether they were removing temporary approval, but rather that they were removing approval.

Q. In other words, you read the letter, did you not?

A. I read the letter.

Q. With respect to any of the member firms that you list in the paragraphs of your complaint, Fourteenth and Sixteenth, did you have any agreements in writing with any of them, and I am speaking now about both the sole proprietorship, Municipal, or Municipal, the corporation?

Mr. Dickstein: Do you mean agreements with respect to private wire connections?

Mr. MacKinnon: That is correct.

A. I do not know of any agreements in writing with reference to private wire connections.

Q. Did you have any oral agreements with each of them or any of them and with whom?

A. Since I did not discuss the matter personally, I wouldn't know. I would have to ask the people in my organization whether there were any oral agreements or, for that matter, whether they had signed any other agreements that I have no knowledge of.

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Q. You referred to Municipal. Did you ever file an application for private wire service with the New York Stock Exchange between member firms and Municipal Securities Company, the sole proprietorship?

A. To my knowledge, none was filed.

Q. Was there anybody else connected with Municipal Securities Company that would have better or more accurate knowledge than you, Mr. Silver?

A. If one was filed without my knowledge, that particular person would have more accurate knowledge.

[fol. 156] Q. Would one have been filed without your knowledge?

A. Probably one could have been filed without my knowledge if my signature doesn't appear on it.

Q. Have you any documents in your files that show such an application was filed for Municipal Securities Company, the sole proprietorship?

A. There seems to be one here which is addressed to Mr. Harry Reed of Municipal Securities Company, in which it is possible that there may have been confusion between the corporation and the proprietorship in view of the fact that Mr. Reed in his original correspondence with the New York Stock Exchange used the proprietorship's stationery, which just said Municipal Securities Company pending receiving stationery for Municipal Securities Company, Inc. He perhaps should have put an Inc. after the Municipal Securities Company, but he did not.

Q. Where is Harry Reed at the present time?

A. Mr. Reed is presently employed by Ditmar & Company, Dallas, Texas. They are members of the New York Stock Exchange.

Q. He was at no time an employee of Municipal Securities Company, the sole proprietorship?

A. No, he was not.

Q. Where is D. Edward Walton?

A. I do not know. I discharged Mr. Walton on October 19, 1959.

Q. When you say "I", you mean Municipal Securities Company, Inc. or Municipal Securities Company?

A. Mr. Walton was only an employee of Municipal Securities Company, the proprietorship.

Q. You discharged him in October of 1959?

A. In October of 1959.

Q. You don't know where he is at the present time?

A. I do not know where he is at the present time. He was an officer and director of the corporation, but not an employee.

[fol. 157] Q. You say in paragraph Twentieth of the complaint, there was a further part of the conspiracy that the defendant, New York Stock Exchange, would induce the co-conspirators, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co.

Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., Dallas Union Securities Co., Inc. and Eppler, Guerin & Turner to breach their aforesaid agreements with the said plaintiff, Municipal, meaning the corporation, providing for private wire connections between the offices of said co-conspirators and said plaintiff.

When were such agreements made?

A. These agreements that you are referring to here and I presume—

Q. It is not what I am referring to, Mr. Silver, it is what you referred to.

A. The agreements that you are referring to that I referred to were agreements wherein they agreed to permit the wire to exist between the two of us.

Q. When were the agreements made?

A. I presume that these agreements were made prior to the application to the New York Stock Exchange by Municipal Securities Company, Inc. for these private wire connections.

Q. Did you participate in the making of such agreements?

A. I did not personally participate in the making of these agreements.

Q. Who participated in the making of such agreements?

A. Mr. Reed. In each of these cases he would call the proper party in each of these companies and say, we would like to have this wire with you. Do you agree to it and they would say, yes, otherwise we would not have installed them between the two.

Q. Were you present when Mr. Reed made any such agreements?

A. No, I was not present.

[fol. 158] Q. Did you participate in the making of any such agreements?

A. As stated before, I did not participate. However, Mr. Reed advised me that he had been in touch with these people and they had agreed to the installation of the private wires.

Q. Were any such agreements evidenced by any writings?

A. Not to my knowledge.

Q. Have you looked to find out; have you examined your files?

A. I haven't looked for an agreement per se of that type, but the files that we had, as turned over to my attorneys, do not disclose it, so I must presume that no such agreements were made in writing.

Q. All you know about them is what Mr. Reed told you; is that correct?

A. That is correct.

Q. In paragraph Twenty-first, when you refer to the aforesaid agreements, are you also referring to agreements concerning which you testified you believe were made by Mr. Reed?

A. Yes, sir.

Q. In other words, it is the same and not different agreements; is that correct?

A. These would be the same, yes, sir.

Q. In paragraph Twentieth, to revert to it a moment, Mr. Silver, you say it was a further part of said conspiracy that the defendant, New York Stock Exchange, would induce the co-conspirators, naming certain member firms, to breach their aforesaid agreements, and that is the same agreement concerning which you testified a moment ago, is it not?

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A. The answer to your question is yes.

Q. Who acted on behalf of the New York Stock Exchange in inducing the member firms that you list in paragraph Twentieth to breach their agreement?

A. I don't know who acted on behalf of the New York Stock Exchange.

Q. Who acted on behalf of the member firms or any of them?

A. I am not sufficiently acquainted with the personnel [fol. 159] of each of these member firms to know whose duties it would be to do this.

Q. Do you know of any personnel in any member firm?

A. I am not acquainted with them, sir.

Q. Not with any of them?

A. Not with any of the personnel to know their duties sufficiently.

Q. I didn't hear that.

A. I am not acquainted with any of the employees of the member firms to know their duties so that I could answer your question properly.

Q. In paragraph Twenty-third, are you referring to the same agreement as that concerning which you testified or to another agreement?

A. Twenty-third is with reference to the agreement between Municipal Securities Company, Inc. and Straus, Blosser & McDowell.

Q. Was that agreement oral or in writing?

A. That was an oral agreement.

Q. Who acted on behalf of Municipal?

A. Mr. Harry Reed.

Q. Who acted on behalf of Straus, Blosser & McDowell?

A. I don't know if I could exactly answer that. I would have to ask Mr. Reed with whom he had his discussions. Perhaps our files disclose that.

Q. Did you participate in the making of any such agreement?

A. Only to the extent of knowing of its existence.

Q. Who told you that such an agreement existed?

A. Mr. Reed.

Q. Were you present when the parties came to the agreement?

A. No, sir.

Q. All you know is what Mr. Reed told you; is that correct?

A. That is correct, sir. Also, I do know that the teletype connection was installed pursuant to what Mr. Reed said and things went on normally, so I must assume the agreement was effected.

Q. I don't know whether I understand you, Mr. Silver.

[fol. 160] Mr. Dickstein: I think what Mr. Silver said is that he had personal evidence of the implementation of such agreement.

Q. That you had knowledge of the implementation of such agreement?

A. Yes, by virtue of the fact that the teletypes were installed in the office.

Q. Did you have any writings with respect to it?

A. As I said before, I did not have any writings.

Q. Mr. Reed was the only person that had any contact with him?

A. Yes, sir.

Q. You were not present when there were any discussions between Straus, Blosser & McDowell and Municipal; is that correct, meaning the corporation?

A. That is true. I might add this: that on occasion I visited the office of Straus, Blosser & McDowell in New York and spoke with Mr. Seligman, who was in charge there—

Q. When was that?

A. After the installation of the teletypes.

Q. Can you fix an approximate time?

A. Not at this moment.

Q. Was there any discussion between you and Mr. Seligman about an agreement between Straus, Blosser & McDowell and Municipal?

A. As best as I recall, there was a discussion that he was very happy with the arrangements.

Q. Did he tell you what the arrangements were?

A. We didn't go into that, sir. He was getting a bit of business and he was very happy with it.

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Q. You refer in paragraph Eighth to Dallas Union Securities Company, Merrill Lynch and Rauscher, Pierce; do you see that allegation? We are now talking about the sole proprietorship.

A. Yes, sir.

[fol. 161] Q. Did member firms of the New York Stock Exchange furnish quotes on municipal bonds and on municipal securities?

A. I presume they furnished them to us and we would furnish them to them if such information was required.

Q. Do you know that they did run quotes on municipal securities, any of the three houses you mentioned, namely, Dallas Union Securities, Merrill Lynch or Rauscher, Pierce?

A. Are you assuming that it is customary to have quotes on municipal securities?

Q. I am not assuming anything. I am asking you a

question. You have made various allegations, Mr. Silver. I am asking you whether these houses furnished to you on this private wire service, which you said you had with them, quotes on municipal securities.

A. They furnished us quotations and we furnished them quotations, if either of the parties requested it.

Q. On municipal securities?

A. On municipal securities as I—

Q. I am talking about Municipal Securities now because I called your attention to paragraph Sixth and you told me that the sole proprietorship was engaged in purchasing and selling certain types of unlisted securities, principally municipal bonds; is that correct?

A. Yes, but there are other types of unlisted securities and if information was required with respect to them, I presume they would also be furnished.

Q. Did either of—any of the firms that you have mentioned in paragraph Eighth, namely, Dallas Union, Merrill Lynch and Rauscher, Pierce, furnish you a private wire service with respect to quotes on municipal bonds or municipal bonds or municipal securities?

A. As I have stated before, if we required information with respect to quotations or if they did from us, it would be handled on that private wire.

[fol. 162] Q. In other words, you used the private wire rather than using a non-private wire in communicating with them; is that correct?

A. If the private wire was available, that certainly would be used in preference to a non-private wire.

Q. Do you know whether or not the New York Stock Exchange furnished any listing of prices with respect to municipal securities and unlisted securities?

A. To my knowledge, the New York Stock Exchange does not list municipal bonds.

Q. Do they quote municipal bonds or do they quote unlisted securities?

A. To my knowledge, they do not.

* * * * * * *

Q. Will you read paragraph Tenth, Mr. Silver, please?

A. I have done so.

Q. That paragraph refers to the business that Municipal, Inc. was engaged in; is that correct?

A. Yes.

Q. Did you know or did you ascertain whether the New York Stock Exchange was furnishing quotes with respect to corporate securities, namely, corporate stocks and bonds at the time that you read the complaint?

A. Yes, sir.

Q. What did you find in that regard?

A. That the New York Stock Exchange furnishes quotes with respect to corporate securities listed with them.

Q. At that time did you make any inquiries to ascertain whether or not they furnish quotes with respect to securities that were not listed with them?

A. I did not so ascertain. I presume they did not furnish quotes with securities that are not listed with them.

Q. Will you read paragraphs Sixteenth and Seventeenth of the complaint, please, Mr. Silver?

A. Yes, sir. I have done so.

* * * * * * *

Q. You make reference in paragraph Sixteenth to a teletype service; is that correct?

A. Yes, sir.

[fol. 163] Q. With whom was that teletype connection?

A. With Straus, Blosser & McDowell.

Q. When was that teletype connection first made, do you know?

A. I can determine that from the record. During October 1958.

Q. October of 1958?

A. Yes.

Q. Did you make application to the New York Stock Exchange for the tie-up of that teletype?

A. I don't recall if we did or whether Straus, Blosser & McDowell did. Perhaps our records would indicate it.

* * * * * * *

Q. Who requested that there be a teletype connection between whatever entity and what was the entity, Mr. Dickstein, was it Municipal, Inc. or the sole proprietorship?

A. It was Municipal, Inc.

Q. Who requested a teletype as distinct from a private wire?

A. As I recall, Mr. Harry Reed had discussions with various firms who were members of the New York Stock Exchange with respect to the installation of a teletype or telemetering teletype in order that listed business be handled through that particular firm. The arrangements would normally be we would give them this listed business, which would come to us through our customers, they would do their best to execute these orders to the best of their ability and in return, they would do what ever they can in connection with over-the-counter securities in which we had an interest for our customers or in general trade.

Q. Were you present at the time that agreement was made?

A. I was not present at the time that agreement was made.

Q. Did you participate in any way in the making of that agreement?

A. I had no discussions with Straus, Blosser & McDowell. I participated, I suppose, to the extent of Mr. Reed reporting to me that these were the circumstances, there were the advantages of each of these particular firms and the decision was then made based on the information he gave [fol. 164] me that perhaps Straus, Blosser & McDowell would be the one to choose.

Q. Was that agreement reduced to writing?

A. I don't believe that it was.

Q. In other words, your best recollection is--

A. I have no knowledge of a written agreement with respect thereto.

Q. Do you know what portion, if any, of your business that concerned listed securities was to be diverted to Straus, Blosser?

A. I believe that in actual practice the major portion of it was probably diverted to Straus, Blosser.

Q. Was that a matter of agreement?

A. Yes. We were under no obligation to give them all our business, but I believe the understanding was that they would get a substantial part of it.

Q. Have you any recollection as to whether there was any understanding or agreement as to the percentage?

A. I know of no agreement as to the percentage of the total business.

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Q. Did you ever call to the attention of the New York Stock Exchange that you had a teletype connection with Straus, Blosser & McDowell; did you ever call that fact to their attention? I am not now talking about an application, I say did you ever call that fact to the attention of the New York Stock Exchange?

A. I do not recall having done so.

Q. If attention was called to that fact, would it have been called by Mr. Reed or by you?

A. I can't answer that, I don't know.

Q. Would you read paragraph Twenty-third, please, of your complaint?

A. I have read it.

Q. Will you state in what manner the New York Stock Exchange induced Straus, Blosser & McDowell to do anything with respect to what you have alleged is an agreement with respect to a teletype?

A. As I recall, Mr. Reed came into the office and told me that he had received a call from Straus, Blosser stating that they had been told by the New York Stock Exchange [fol. 165] to discontinue the teletype service.

Q. Can you fix the date when he told you that?

A. It was the date February 13, 1959.

Q. Were you present in any conversation with any representative of Straus, Blosser & McDowell and Mr. Reed when that message allegedly was relayed to Mr. Reed?

A. No, I was not present when that message was relayed. I do not recall being present at any rate.

Q. The only thing you know about it is what Mr. Reed told you about it; is that correct?

A. That is correct.

Q. Would you read paragraph Twenty-fourth of your complaint?

A. I have done so.

Q. Will you continue with Twenty-fifth and I will ask you this in my next question with respect to both?

A. I have done so.

Q. What acts, if any, did the New York Stock Exchange do to prevent Municipal, I am now speaking of the sole proprietorship from exercising an essential and necessary part of its local trade? My question is confined to the sole proprietorship.

A. By having the private wires between Dallas Union Securities Co., Merrill Lynch and Rauscher, Pierce discontinued and removed from between our offices and theirs.

Q. Those private wires were used, were they not, solely between yourself, meaning the sole proprietorship, and the three firms that you have mentioned in connection with municipal securities, municipal bonds and unlisted securities?

A. That is correct, sir.

Q. You are aware, are you not, that the New York Stock Exchange does not carry on its wires any quotes with respect to municipal bonds or unlisted securities?

A. I am aware of that, but then why did the New York Stock Exchange have them discontinue those wires?

Q. You are aware of the fact that I asked you that they do not carry quotes of municipal bonds or unlisted securities over their wires?

A. I am aware of the fact that the New York Stock [fol. 166] Exchange does not furnish quotations in connection with municipal securities or unlisted stocks.

Q. How did the New York Stock Exchange or what act of the New York Stock Exchange—and I am directing myself now to paragraph Twenty-five—prevent Municipal, the sole proprietorship, from rendering whatever business it had with its customers in interstate commerce?

A. By having the private wire connections removed between the three companies and ourselves, it was more difficult to transact business involving either Texas municipals or out-of-State municipals or any unlisted securities in which we were transacting business.

Q. Were you not able to receive the same information, which you had received over private wires, over other than private wires between those three houses or any other houses?

A. In a much more inconvenient way, it could be done.

Q. But it was possible to do it?

A. It would be possible to use the regular telephone service to call them, but the time element involved might be entirely to our disadvantage.

Q. With respect to Municipal, Inc., the corporation, what acts did the Stock Exchange do which prevented plaintiff from exercising a necessary part of its business?

A. The New York Stock Exchange, by removing the private wire connections between the member firms and the corporation, by removing the teletype service between Straus, Blosser & McDowell and the corporation, and by removing the ticker quotation service did so.

* * * * * * *

Q. Mr. Silver, it was true, was it not, that whatever bids or whatever orders you received for listed securities you were able to place with members of the New York Stock Exchange after the removal of the wire as you had done prior thereto?

A. They could be placed, but we would not be doing our customers—we would not be giving our customers the best [fol. 167] service because of the time elements involved. It may take more time and, sometimes substantially more time, to execute an order that way between the time we receive it and its execution than if we could use a private wire.

Q. That is the time element, the difference was the time element?

A. In this particular case, yes. I might add the time element could, of course, affect the price.

Q. What acts did the New York Stock Exchange do that prevented Municipal, the corporation, from rendering business to its customers in interstate trade?

* * * * * * *

A. I will give you an example of that. We dealt in over-the-counter securities in which we would make our arrangements to either buy or sell them through the wire between Straus, Blosser & McDowell and ourselves. Straus, Blosser & McDowell were located in New York, we were in Dallas. We would then perhaps be buying from another firm located in New York to which Straus, Blosser & McDowell

had a direct private wire. If we couldn't do that, it was impossible from a practical viewpoint to do business with that particular firm in New York. It would be costly to make a telephone call, it would be costly to have private wires to each of these New York concerns and it was much more desirable and certainly was the logical way and the normal way and the natural way in which other concerns do business of this type by having one direct wire to a concern into New York and they would have perhaps twenty, thirty, some have a hundred wires to other over-the-counter houses in New York City.

Q. This was all with respect to unlisted securities; is that correct?

A. This is specifically with respect to unlisted securities. The listed securities would be done with Straus, Blosser & McDowell who would then check with their man, I presume, on the floor or whichever way it was executed, or if we did a listed piece of business with Rauscher, Pierce, [fol. 168] I think they had a direct wire into New York and it would probably be executed through that wire.

Q. Did Straus, Blosser have a Dallas office?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No.

Q. Do you know with what office of Straus, Blosser your Municipal, the sole proprietorship, and then Municipal, the corporation, was connected?

A. Their New York office. Their office on—

Q. That is all I want to know. It was their New York office?

A. Yes, sir.

Q. There isn't any doubt in your mind on that?

A. No. I have visited their office in New York.

Q. I am quite sure that practically every brokerage firm that I know have offices all over creation. I don't know how many they have in Dallas, but if they haven't got an abundance of them, it would be the first city that I know of.

Q. You say that all of the acts were done without just cause or provocation; is that correct?

A. Yes, sir.

Q. All of the acts done by the New York Stock Exchange?

A. Yes, sir.

Q. Do you believe that the New York Stock Exchange is required to have its facilities available for people who are running a sole proprietorship or a corporation that do not have security clearance?

* * * * * * *

A. I think it has nothing to do with it.

Q. You think it has nothing to do with it. Is it your opinion that the New York Stock Exchange must give its facilities to anybody that asks for them?

A. May I ask my counsel a question?

* * * * * * *

A. Yes, I think it is a public service and should be given to anybody that asks for them. This is my opinion.

[fol. 169] Mr. McKinnon: Very well, that is all right, that is all I wanted.

Q. I show you Defendant's Exhibit 6 for identification, which was marked yesterday, and I ask you to read paragraph 6 thereof.

A. I have read paragraph 6 thereof.

Q. Had you observed that at the time that you signed the exhibit?

A. I do not recall.

Q. It is being called to your attention by me for the first time?

A. I do not know.

Q. What is your best recollection?

A. My best recollection is I don't know.

Q. Does not Defendant's Exhibit 6 for identification provide in pertinent part, "We," meaning Municipal Securities Company, Inc., "agree that the wire or other connections and the furnishing of quotations to us shall be discontinued whenever you" meaning the New York Stock Exchange, "shall withdraw approval thereof."

The Witness: I didn't hear it.

(The question was read.)

A. I am not an attorney and can't interpret a contract, but—

Q. Can you read it?

A. I can read it, yes, sir. Shall I read it?

Q. I just pointed it out to you. What does that say?

A. Yes, it says that.

* * * * * * *

Q. Subsequent to the removal of the private wires, did Municipal, the sole proprietorship, continue to do business?

A. It continued to do business, but with some difficulties.

Q. That continuance of business or that business has continued down to date; is that correct?

A. The business is still in existence, however, we have closed all our branch offices.

[fol. 170] Q. Where did you have any branch offices in 1958 and 1959?

A. Lubbock, Texas; Amarillo, San Antonio, Texas and Longview, Texas.

Q. Is that all?

A. Those were all the offices we had.

Q. Were they all offices of Municipal, the sole proprietorship?

A. Municipal, the sole proprietorship, conducted business in all of them and Municipal, the corporation, conducted business primarily in Dallas and in San Antonio.

Q. Did Municipal, the corporation, continue to do business after the wire service and the ticker service was discontinued?

A. It did. It tried to continue in business but found that it was increasingly difficult, if not impossible, to do so.

Q. Has it continued to do business down to date?

A. No, it has not.

Q. When did it cease doing business?

A. I would say the last time it did any business was in September 1959.

Q. September of 1959?

A. Yes.

Q. At that time was its office closed?

A. Yes, all of its business in San Antonio had been discontinued and the office in San Antonio was still being

partially used by the proprietorship because there was a lease in effect and we had to pay rent anyway, but there were no employees of the corporation there—give me the question.

(The question was read.)

A. —the office in Dallas, used by the corporation, was taken over by the proprietorship, all of the services being used by the corporation was discontinued and in general, the corporation became completely dormant in terms of business on or about the middle of September.

Q. During the period February to September 1959, that is the period after the wires were pulled and the cessation of business of Municipal, the corporation, did Municipal, the corporation, do business in connection with listed and unlisted securities?

A. It tried to.

[fol. 171] Q. Did it continue to place orders for listed business?

A. I believe it did some, yes.

Q. With what member firms did it place business?

A. I couldn't tell you without referring to the records.

Q. Have you got such a record?

A. I am sure we could find it.

Q. Will you produce it for your counsel, so that he can make it available to me?

A. I will be very happy to.

Q. After the discontinuance of the wires, did Municipal, the sole proprietorship, continue to participate and sell and distribute municipal securities and unlisted securities?

A. It did and it still does. However, I must say that on a number of occasions we were specifically told we couldn't participate in an account because, obviously, there was a problem, the New York Stock Exchange pulled our wires and in general there was a hesitancy on the part of people in the business to do business with us.

Q. Subsequent to the discontinuance of the wire service with respect to Municipal, the sole proprietorship, was business handled with any of the member firms of the New York Stock Exchange with respect to any municipal security purchases?

A. I am reasonably certain we did business with them.

Q. Can you tell me with what member firms you did business?

A. The information can be obtained for you, sir.

* * * * * * *

Q. What customers did Municipal, the corporation, lose that it had prior to the time that the wire service was discontinued?

A. Since it's gone out of business, it has no customers.

Q. That is all right. My question still is what customers did they lose.

A. All of them.

Q. Then I will have to ask you what customers did they have before the wires were pulled and what customers were lost thereafter.

[fol. 172] Mr. Dickstein: By individuals' names?

Q. You told me that they did business with you or continued to do business from February to September. You allege in your complaint that you lost customers.

A. That is right, by the time September rolled around, we had no business left.

Q. You may have one version of that and somebody else may have a very different version.

A. I am giving you my version.

Q. The point that I make is, you say you lost customers. I want to know what customers you lost. This is a specific allegation?

A. Customers cover two categories. People you do business with in effect on a wholesale basis and those whom you do business with on a retail basis.

Q. Municipal, the corporation, didn't do any business with anybody on a wholesale basis, did they; the corporation I am talking about now?

A. Yes. You are talking about the corporation. I presume, now to divide the question of wholesale. As I recall, you discussed wholesale before as opposed to retail.

Q. That is right.

A. And we will refer to retail business as business with individuals or customers and wholesale business as business with other dealers wherein—

Q. Underwriters.

A. —where we would take a position in a security and in effect hold it for retail to other dealers or to individual customers.

Q. Did the corporation do both?

A. The corporation did both and I would say a greater part of the volume of the corporation was probably in its business with other dealers rather than with retail customers. Business with other dealers disappeared rather quickly with the discontinuance of the wires because it was impossible to work with them. You couldn't—normally [fol. 173] when you are dealing in that type of business, you must be in a position to very quickly get quotations from the other dealers in the business. You flip a key, somebody gets on and you ask him the question, he answers it. You either do business or you don't or you flip another key and see how your markets are going.

Now, with the discontinuance of these wires, the wholesale business, as such, rapidly went down.

Q. All right.

A. With perhaps an exception in a security where we may have had a big position and people came to us for it because of that factor, but once that was gone, that was gone.

Q. Let's cover the retail. What customers did you lose in retail?

A. By the same token, it is a little more difficult to make a generalization on the retail without having specific records in front of me. The retail business, as I say, was a smaller portion of the business and the retail business was inevitably intertwined with listed business. If a man dealt with you, he would like you to take care of all of it. We made no money at all on listed business.

Q. You were not a member firm, were you?

A. That is correct.

Q. So you couldn't expect to make money, could you?

A. We did not expect to make money. I am merely mentioning this, but we did it as a service to our customers and when we were unable to provide that service, it was difficult to continue doing some of the over-the-counter business with them because then they would have to do business

with two people and again their inclination was to do business with one firm rather than with two firms.

Q. Would you again turn to Municipal, the sole proprietorship?

A. Yes, sir.

Q. And tell me what business you lost after the discontinuance of the wire service.

A. It would be difficult to enumerate the business you [fol. 174] lose. The only thing that happens is that people do not call you as much over the regular telephone wire as opposed to the private wire connection, so if there is a deal going or if they can do business with you on a certain issue as opposed to doing business with one with whom they have a wire connection on a certain business, this inclination is to use the private wire connection because it is quicker, easier and less cumbersome. I couldn't tell you how much business we lost there, it may have been a huge sum.

Q. As far as listed business is concerned, Mr. Silver, Municipal, Inc. lost none because it did not do a listed business, did it?

A. I think I answered that question before.

Q. That you made no money on it?

A. We made no money on listed business, but that it was very closely tied up with our over-the-counter business.

Q. In other words, you tried to use it as a feeder; is that correct?

A. As a what?

Q. A feeder.

A. What is a feeder?

Q. If you don't know, I can't elaborate.

Mr. Reilly: Come-on.

A. The term isn't—

Q. No, it isn't a very good term. It isn't a come-on.

A. We gave that as an additional service to our clients and it was necessary to the extent that in order to get their other business, we provided the service because, as stated before, the over-the-counter business and the listed business of any one individual retail customer would normally go hand in hand.

Q. Have you compiled a list of the customers that you lost, Municipal, the sole proprietorship, and Municipal, the corporation?

A. I have not compiled a list of the customers we had or lost or might have had.

[fol. 175] Q. When we are dealing with might have had, I am eliminating that, that is prospective. I want to know whether you compiled a list of customers that you had and lost, Municipal, the sole proprietorship, and Municipal, the corporation.

A. I have not compiled such a list.

Q. Can such a list be compiled by you?

A. We can try.

Q. Will you do so?

A. I will try to do so.

Q. You have alleged in paragraph Twenty-eighth of the complaint, will you read it, please?

A. Yes, sir.

Q. Twenty-eighth and twenty-ninth, that you were damaged, meaning Municipal, the sole proprietorship, and Municipal, the corporation, was damaged to the extent of $500,000; is that correct?

A. In Twenty-eighth it is alleged that Municipal, the proprietorship—

Q. The sole proprietorship.

A. —was damaged to the extent of $500,000.

Q. And the next one, Municipal, the corporation?

A. That is Twenty-ninth; yes, sir.

Q. Have you compiled an item or items as to how you make up the $500,000 in each instance?

A. No, sir, I have not compiled item or items.

Q. Have you made any computation for Municipal, the sole proprietorship, or Municipal, the corporation, that shows damages of $500,000?

A. I have not made such a computation.

Q. Has anybody made such a computation in your behalf?

A. Not to my knowledge.

Q. How, then, did you choose the figure of $500,000 to be embraced in your complaint?

A. It was an educated guess.

Q. Will you tell me how you arrived at your educated guess for Municipal, the sole proprietorship, and Municipal, the corporation?

A. I asked myself, Harold, how much do you think this [fol. 176] may have caused you in terms of damage and I said approximately a half a million dollars.

Q. Is that the way you arrived at it?

A. That is the way I arrived at it.

Q. You made no computations of any kind or character?

A. I made none.

Q. Did Municipal, the sole proprietorship, file income tax returns?

A. The proprietorship does not file an income tax return. The business involved in the proprietorship is incorporated in my income tax return.

Q. That is Harold J.'s?

A. That is correct.

Q. Was there embraced in that tax return a schedule showing the results of the operation of Municipal, the sole proprietorship?

A. In my tax return there is embraced information with respect to the operations of Municipal Securities Company, the proprietorship.

Q. Will you produce those tax returns for the periods prior and subsequent?

Mr. Dickstein: The returns or the schedules?

Mr. MacKinnon: I want the information. I have no interest to make any inquiries into Mr. Silver's personal life.

Mr. Dickstein: Schedules C's on the proprietorship.

Mr. MacKinnon: Whatever the schedule is, I don't know.

Mr. Dickstein: For what period of time?

Mr. MacKinnon: From the date of its organization down to date.

The Witness: Yes, I will. I will be very happy to provide whatever information you require.

By Mr. MacKinnon:

Q. Did you file income tax returns for Municipal, Inc., the corporation?

A. Yes, sir.

[fol. 177] Q. Will you furnish copies of those income tax returns?

A. Yes, sir.

Q. Have you paid franchise taxes on Municipal, Inc., the corporation, down to date; I think I asked you that before and I think you told me you did?

A. Any taxes with respect to the corporation are current.

Mr. MacKinnon: Now I can promise you that I will be through in the morning. It is now 5:15 and I will go on at that time and I do not think I will need Mrs. Silver.

* * * * * * *

Q. Mr. Silver, will you turn to paragraph Thirty-fourth of your complaint, please?

A. Yes, sir (referring to document).

Q. Will you read it?

A. I have read it.

Q. To what contracts do you refer in paragraph Thirty-fourth of your complaint, Mr. Silver?

A. To the oral agreements between these companies and ourselves with reference to the installation of the private wires.

Q. Can you state the terms of such agreements?

A. I believe I stated them previously, to the effect that to my knowledge, to the best of my knowledge, they concern the installation of these wires in which we agreed to give each other business, in effect, over the wires to expedite our respective business between ourselves.

Q. Were any written agreements whereby you would give any specified portion of the business to any given broker or any given member firm, rather?

A. To my knowledge, there were no written agreements.

Q. Did you specify what percentage, if any, you would give to any member firm?

A. Not to my knowledge.

Q. In other words, was that a matter of discretion on the part of Municipal, the sole proprietorship, and Munici-

[fol. 178] pal, the corporation?

A. As stated, I personally made none of these contracts. I do not know that any specified percentages were discussed. I was not advised of any.

Q. Have you ever seen any agreements?

A. I have never seen any written agreements with respect thereto.

Q. Have you ever looked for any such agreements?

A. I have never looked for any such agreements.

Mr. MacKinnon: Will you do so upon your return to Dallas and if there are any such agreements, produce them or have your counsel produce them?

Mr. Dickstein: Surely.

Q. Are you able to state any further the terms or conditions of any of the contracts which you allege you made with the parties named in paragraph Thirty-fourth? That is, state further than you have stated?

A. Not having made any of these personally, it would be difficult for me to make any additional statements.

Q. Did you participate in any way in the making of any such agreements or any such contracts as you there designate them?

A. No, I did not participate in them, as I have stated before.

Q. Were you present when the contracts, which you allege were made, were made?

A. No, I was not present. Had I been present I would have participated.

Q. Not necessarily.

A. Had I been present I would have participated.

Q. All right. Who carried on whatever negotiations were carried on, Mr. Reed?

A. Mr. Reed.

Q. And Mr. Reed reported to you?

A. He advised me, yes, sir.

Q. And that is the only information you have with respect to it, is that correct?

A. That is correct, sir.

* * * * * * *

[fol. 179] Q. Will you read paragraph Thirty-fifth, please?

A. I have done so (referring to document).

Q. You there state, among other things, that the New York Stock Exchange arbitrarily enticed the member firms

to repudiate what you say were agreements with Municipal, the sole proprietorship, and Municipal, the corporation, and I inquire as to in what manner they enticed the member firms to do anything?

A. The facts speak for themselves.

Q. They do not to me, so I want an elaboration of what facts you have in mind. If it was a discontinuance of the service without more, you may so state. If there is something more, I want to know what it is.

A. I believe I can best answer you by saying that the communications of the New York Stock Exchange to these various member firms to discontinue their wire connections with us as well as the discontinuance of the ticker quotation service.

* * * * * * *

Q. In what way was the action of the New York Stock Exchange with respect to its member firms arbitrary?

A. In my opinion, it was arbitrary because, upon calling the New York Stock Exchange and asking them "Why?", they said, "We don't have to give you a reason."

Q. Isn't it true that you did confer with representatives of the New York Stock Exchange?

A. Yes, sir.

Q. Isn't it true that the New York Stock Exchange informed you that if you desired to do so and you produced references from individuals, people that you were doing business with, it might prove of some assistance?

A. That was done. The firm of Leon, Weil & Mahoney.

Q. That is a law firm, is it not?

A. Yes, a law firm, was in touch with, I believe, one of the officers of the Exchange.

Q. On how many occasions?

A. I do not recall, perhaps I do not know.

[fol. 180] Q. Do you not have the material here that shows that they saw them on one occasion and only on one occasion?

A. I have no material with respect to that. I think it was Mr. Leon of that firm advised me that he had showed to whomever he spoke with, these various and sundry letters of recommendation. I think there must have been a dozen of them.

Q. Were you present?

A. No, I was not present, sir.

Q. So all you know in that regard is what Mr. Leon told you?

A. Yes, what was reported to me, yes, sir. I was not present at the meeting or meetings. I believe my attorneys have copies of such letters, if you wish to see them.

Mr. MacKinnon: No, I don't want to see them at this time.

The Witness: Does that answer your question?

Mr. MacKinnon: Yes, it answers my question so far as Mr. Leon is concerned.

Q. I am asking you now, Mr. Silver, did you not discuss this question with representatives of the New York Stock Exchange and were you not told that you, if you desired to do so, you could assemble and produce whatever data you wanted with respect to the reputation, repute, standing and so forth of Municipal, the sole proprietorship, and Municipal, the corporation?

A. I was so advised and it was done so on my behalf by Mr. Leon of the law firm of Leon, Weil & Mahoney.

Q. Is that so?

A. That is true, yes, sir. I would be very happy to give you the letters.

* * * * * * *

Q. Did you think it was arbitrary for the New York Stock Exchange to require its members to discontinue wire service and ticker service with a sole proprietorship of an individual who had been denied security clearance? [fol. 181] A. I believe it was arbitrary on their part, yes, sir.

Q. Did you think it was arbitrary for the New York Stock Exchange to require its members to discontinue wire service to a corporation which was controlled by a husband and wife, both of whom had been denied security clearance by the United States Government?

A. I think it was arbitrary, sir.

Q. You also say that the discontinuance of such service and the Stock Exchange's participation in it was malicious. In what manner was it malicious?

A. I think the mere doing of it was malicious.

Q. The act alone without more?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Will you read paragraph Thirty-sixth, please?

A. I have read it (referring to document).

Q. Are you able to state what agreements the New York Stock Exchange induced any of its member firms to violate so far as the sole proprietorship is concerned? We will take that first.

A. I think we have covered this before but I will—

Q. You need not repeat it if it is your position that your prior testimony applies.

A. I believe my prior testimony applies.

Q. Don't believe so, state so.

A. My prior testimony applies.

Q. Is the same true with respect to Municipal, the corporation?

A. Yes, sir.

Q. You also state in paragraph Thirty-sixth that "the plaintiffs have sustained great loss and damage."

This is something that has already happened, as I read your allegation of the complaint; is that correct?

A. Some damage has occurred, yes, sir.

Q. I want you to tell me what damage occurred. What loss or damage occurred to Municipal, the sole proprietor-[fol. 182] ship, first.

A. We found it necessary to close our branch offices because our employees did not continue completely with us in view of the fact that the Stock Exchange had ordered the removal of the wires and other services that we had.

Q. In other words, loss of employees?

A. Loss of employees, loss of volume of business went down as a result of that.

Q. What volume of business was lost? Can you give me any fact with respect to the loss of a penny's worth of business?

A. I don't have my books here from which to determine it.

Q. Can you determine it from your books?

A. We could try.

Q. Will you try and if you are able to determine it, produce it to me through your attorney?

* * * * * * *

Q. With respect to Municipal, the corporation, what loss or damage was suffered by it?

A. The same type of loss or damage which was suffered by Municipal, the proprietorship, and which subsequently led to the complete shut-down of the operation and the further fact that no business is presently being done by the corporation.

Q. I am only asking about the period embraced in the complaint. As I read paragraph Thirty-sixth, that refers to a definite loss and damage at the time the complaint was drawn.

A. At the time the complaint was drawn, the office was not completely shut down and, therefore, that part of it perhaps would not apply to the answer of your question. So we can perhaps eliminate that. That would apply to further damage.

Q. Will you produce to your counsel for production to me whatever evidence you have of such loss and damage as far as Municipal, the corporation, is concerned?

A. We will attempt to gather it and produce it.

[fol. 183] Q. Since the date of the discontinuance of wire service with the member firms named in the complaint, has Municipal, the corporation, accepted any orders for listed securities?

A. Without reference to the records it would be difficult to answer the question with absolute accuracy. However, I believe that they probably have.

Q. Do you know with what member firms such business was placed?

A. I would not know without further reference to the records.

Q. Will you ascertain that fact and furnish it to me, please, through your counsel?

A. Yes, sir.

Q. Has Municipal, the sole proprietorship, since the date of the discontinuance of the private wires with the member

firms of the New York Stock Exchange and the ticker quotation with Municipal, the corporation, placed any orders for listed securities?

A. Without a complete check I could not accurately answer it, but I believe that they have not.

Q. Will you ascertain that fact and furnish me with that information through your counsel?

A. Yes, sir.

Q. Will you turn to paragraph Forty-first of your complaint and read it, please?

A. Yes (referring to document). I have read same.

Q. To what wrongful acts do you refer in paragraph Forty-first on behalf of the New York Stock Exchange?

A. The fact that they were instrumental in the discontinuance of the private wires between the member firms and ourselves; the discontinuance of the teletype between Straus, Blosser & McDowell and ourselves and the discontinuance of the ticker quotation service that was being furnished us.

Q. Your statement with respect to such wrongful acts applies to both Municipal, the sole proprietorship, and Municipal, the corporation?

A. Yes, as the services affected each one.

[fol. 184] Q. The quotations service, the ticker service, was a service that was rendered to Municipal, the corporation?

A. That is correct.

Q. So that the discontinuance of that had nothing to do with Municipal, the sole proprietorship, had it?

A. No, the ticker quotation service, as such, had nothing to do with the proprietorship.

Q. And the discontinuance of the private wire service to all except Dallas Union, Merrill Lynch and Straus, Blosser had nothing to do with Municipal, the sole proprietorship?

A. That is not necessarily true.

Q. Nothing is necessarily true in any case, so let's confine ourselves to this situation.

The Witness: Strike "That is not necessarily true."

A. I can answer you best by stating that the proprietorship had lines to these three members herein referred to whereas the corporation had these private lines to many additional firms. The offices of the corporation and the proprietorship were located, at the time of the discontinuance, in the same office area and if it was necessary for an employee of the proprietorship to communicate with one of the firms who was available through the corporation's wire, they would not hesitate to do so. It was still a much more convenient device, much faster and much better from their viewpoint to use if it would serve their purpose.

Q. In other words, if they desired to use it, it was there; is that it? The private wires were there if they desired to use them?

A. Yes, sir.

Q. When the private wires were removed, you were still able to reach, or the sole proprietorship was still able to reach whatever brokerage houses it wanted to reach on other telephone service?

A. Regular telephone service was still available to both [fol. 185] the corporation and the proprietorship.

Q. You say in paragraph Forty-first that defendant "seriously impaired the vested property rights of the plaintiffs." What property rights of the plaintiffs were impaired?

A. The right to do business.

Q. How was the right to do business impaired? Municipal, the sole proprietorship, is still doing business, is it not?

A. Not as well as it was doing it before and, therefore, it is impaired.

Q. Is that what you meant by that allegation of your pleading?

A. Perhaps I can further expand by saying that it refers to our right to do business as other people do business and the right to do business as we were doing it prior to the action of the New York Stock Exchange.

Q. Is that true also with respect to Municipal, the corporation?

A. Yes, sir.

Q. There are plenty of people, are there not, that are doing business without the wire service of member firms of the New York Stock Exchange?

A. They are not doing it as well as we were doing it with the wire service.

Q. In other words, you say the impairment was the manner that you did business; is that correct? The manner in which you did business?

A. I might go further and say the fact that other firms are not doing it doesn't mean that they should not perhaps do it. If they are not aware of what they should do in their business, I cannot be held responsible for what they are doing.

Q. Mr. Silver, I don't think you are asked to be responsible for what other people are doing. You have a right to do your business the way you want to do it. Somebody else has the right to do their business in the way they want to. I am dealing with you. I am trying to find out what vested property right of Municipal, the sole proprietorship, and Municipal, the corporation, was impaired.

[fol. 186] A. The very right that you refer to in your previous statement, *the right to do business as I would do* it as against the right of somebody else to do business the way they want to do it.

* * * * * * *

Q. Is it your position that Municipal, the sole proprietorship, and Municipal, the corporation, had a vested right to have wire connections with member firms of the New York Stock Exchange?

A. It is my position that the proprietorship and the corporation had a right not to have these connections interfered with. I am at a loss to further clarify it now, sir.

Q. Let me ask you the question: at the time you made application, you knew and when I say "you" I am talking about Municipal, the sole proprietorship, and Municipal, the corporation, knew that they were being given temporary approval pending an investigation, did they not?

A. Based on the paper you showed me sometime ago, it appears that was the agreement that they signed.

Q. There wasn't any doubt about it, was there?

Mr. Dickstein: The agreement speaks for itself, Mr. MacKinnon.

A. I don't deny the existence of the agreement. Leave out the word "appears", I am sorry, sir.

Mr. MacKinnon: Read the last question and answer, please.

(The record was read.)

Q. Can you now state any further than you have what vested property right defendant, the New York Stock Exchange, impaired?

A. I cannot state any further.

* * * * * * *

[fol. 187] Q. What irreparable harm did the discontinuance of such wire service occasion to the sole proprietorship and to the corporation?

A. The business of both the proprietorship and the corporation which was lost cannot be replaced, and that harm is irreparable.

Q. You are going to furnish me, through your counsel, with evidence of whatever business that was to the sole proprietorship and to the corporation; is that right?

A. We will attempt to furnish you, but it is difficult to know what business you didn't get because of a certain event. We will try to.

* * * * * * *

Q. That is what you did do. My question is how did the New York Stock Exchange interfere with the lawful conduct of Municipal, the sole proprietorship, and Municipal, the corporation's business?

A. With reference to the proprietorship, the discontinuance of the wires prevented it from doing its normal business in municipal securities. With reference to the corporation, in addition to not being able to do the listed business as an accommodation for its customers, it was unable to do its over-the-counter business, which probably was substantially greater than the amount of listed business it did. It was the over-the-counter business on which the proprietorship made profits.

Q. It was the only business on which it made profit, was it not?

A. The corporation?

Q. Yes.

A. The corporation made money on over-the-counter business, made money in connection with its underwritings. I would say that was substantially the major source of its income.

Q. It made no money out of any listed securities, did it, out of the purchase and sale of listed securities for customers?

The Witness: Read the question, please.

(The question was read.)

[fol. 188] A. No, sir, it made no money definitely out of such.

Q. Do you want to elaborate something more?

A. No, I have nothing to elaborate.

* * * * * * *

Mr. MacKinnon: Aside from that, the examination of Mr. Silver is closed and we will go on tomorrow morning with Mr. Coleman and I will communicate with you during the day as to where we will do it.

Mr. Dickstein: All right.

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[fol. 189]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM DEPOSITION OF WALTER COLEMAN

WALTER COLEMAN, called as a witness by plaintiffs, having been first duly sworn by the Notary Public and stating his residence at 154-04 Beech Avenue, Flushing, New York, testified as follows:

Examination.

By Mr. Dickstein:

Q. Will you state your name, please?

A. Walter Coleman.

Q. You are connected with the New York Stock Exchange, Mr. Coleman?

A. Yes, sir.

Q. In what capacity?

A. Assistant director, Department of Member Firms.

Q. How long have you held that position?

A. Approximately five years.

Q. Were you with the Exchange prior to that time?

A. Yes, sir.

Q. In what capacity?

A. Various capacities, manager of division, and subordinate capacities for many years.

Q. Manager of what division?

A. I was manager of the Division of Member Officers and Personnel, I was manager of the Division of Commissions and Quotations.

Q. How long in all have you been affiliated with the New York Stock Exchange?

A. Since February 1921.

* * * * * * *

Q. Are you aware of Exchange policies, Mr. Coleman?

A. Yes.

Q. Are you aware of Exchange policies with respect to Exchange administration and control of its stock quotation services?

A. Yes, sir.

Q. Do you know why the Stock Exchange determines whether a particular individual or firm may have stock quotation service?

* * * * * * *

A. Yes, sir.

Q. Why?

A. I mentioned before that the Exchange is a quasi-public institution. The Exchange feels that it has a definite [fol. 190] responsibility to protect the public interest, and in order to do that it feels that it should make every effort to prevent any of its facilities from falling into the hands of anyone who either might abuse those privileges or who might, for reasons of reputation or possibly other reasons, might affect the public interest adversely. We set for our

own members a very high standard of ethics and performance. We feel that we shouldn't have two standards if any non-members are going to enjoy our facilities, they should be subject to the same standards.

Q. Do you know what dangers to the public interest the Exchange attempts to avoid by precluding persons of bad reputation from having its stock quotation service?

A. Yes.

Q. What are those dangers?

A. I know some of them.

Q. Just your own knowledge, Mr. Coleman.

A. The operation of bucket shops, boiler shops, to use the vernacular.

Q. What is a boiler shop as distinguished from a bucket shop?

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A. A bucket shop is an organization or an individual which consistently takes the other side of the market from the customer, who accepts customer's orders and, as a general rule, never executes the orders, but just gambles on the fact that the customer is wrong.

Q. And a boiler shop?

• • • • • • •

A. My answer in all of these is within the limits of my own understanding.

Q. What is a boiler shop?

A. A boiler shop is usually a physically small operation which employs high pressure telephone salesmanship to oversell to the public by quantity, and in many cases by quality.

Q. And what other types of dangers does the Exchange seek to avoid?

A. The danger of a non-member organization, or a mem- [fol. 191] ber organization not having sufficient capital to protect the customer's property rights and privileges in connection with transactions he might make.

Q. Any others to your knowledge?

A. Anyone who might misrepresent any material facts or withhold any material facts from a customer.

Q. Material facts with respect to what?

A. With respect to securities, with respect to the standing of the firm or organization, with respect to applicable laws or statutes or registrations or filings, or any other misrepresentations.

* * * * * * *

Q. Have you covered reputation?

A. I have covered reputation in general, but I would certainly extend the reputation to mean again people of good repute.

Q. You would agree with Mr. MacKinnon that the Exchange would not install a ticker in a bawdy house?

A. I certainly agree, nor would we give it to anyone with a criminal record.

Q. When you say anyone with a criminal record, do you mean anyone who has ever been convicted of any criminal offense whatsoever?

A. I am not a lawyer. You would have to define criminal offense to me.

Q. We will take it in series. Would you preclude anyone who had ever been convicted of a felony from having quotation service?

A. It would depend on what the felony involved.

Q. What type of felony would preclude an individual from subscribing to a quotation service?

A. I don't think I can think of all the possibilities, but let me name you a couple. Manslaughter with a vehicle, possibly a technical Sullivan Law violation which might or might not be felonious. I don't know. Again, I am not a lawyer.

Q. Are you defining felonies which might not preclude?

A. Which might not preclude. A felony which would, in my opinion, preclude, would be any felony involving fraud, [fol. 192] deceit, fraudulent conversion, using the mails to defraud, violation of any of the Federal or State statutes regarding securities transactions.

Q. Would you say generally that the type of crime which would result in the preclusion of wire service would be a crime relating to the securities business in the first instance, and business honesty and equity principles of trade in the second?

A. Yes, but not necessarily in that order.

Q. But these two areas would fairly embrace the type of crime to which you had reference?

A. It would not necessarily completely embrace it, no.

Q. What other types of crimes might there be that fall outside of these areas?

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A. Conceivably one of the crimes—I don't know how much of a crime it is—Mr. MacKinnon referred to it previously.

Q. What crime—maintaining a bawdy house?

A. Maintaining a bawdy house.

Q. Would the Exchange also preclude wire service to someone who had been found guilty of a misdemeanor, in the areas that we have been discussing?

A. I could not answer the question.

Q. It would depend on a case to case basis?

A. It would depend on all of the circumstances.

Q. Would one of the factors considered be how long it has been since the commission of the offense?

A. It could be one of the factors, coupled with what the record had been since then.

Q. What you have been saying, Mr. Coleman, has been specifically directed to my question with respect to the purposes of the Exchange's control over ticker service. Is precisely the same thing true with respect to the Exchange's control over wire connections between members and non-members?

A. Yes, sir.

[fol. 193] Q. In implementing these rules, is the Exchange concerned only with improper securities transactions in securities listed on the Exchange?

A. No, sir.

Q. It would then be true that it is concerned with operations in any type of security?

A. Yes, sir.

Q. What does the Exchange do, and more specifically, what does your department do when information comes to its attention that one of its member firms has made a private wire connection with a non-member, without first securing Exchange approval?

A. The first thing we would do would be to check the

information to see if it were accurate. If it were, we would ask for an explanation.

Q. With whom would you check?

A. The member firm.

Q. And what would happen after you got the explanation?

A. It would depend on what the explanation was.

Q. Assuming that the explanation was not satisfactory, what would be the next step in your procedure?

A. Again, depending on the matter of degree of what was wrong, or how badly wrong, or how poorly they had explained, or how inadequately they had explained, the Exchange might involve any disciplinary action, or none. If the wire were to be continued, we would ask for a formal application.

Q. Who, under the Exchange's constitution and rules, has the responsibility of notifying your Department of such a connection—the member firm or the non-member firm?

. . . . . .

A. The member firm.

. . . . . .

Q. What does the Exchange do when a member firm fails to discontinue a non-approved or a disapproved private wire connection with a non-member after being notified that it should so discontinue?

A. I could not answer that, because I don't know of any such case.

[fol. 194] Q. It has never happened in the time in which you have been connected with the Exchange?

A. Not within the limits of my recollection.

Q. And how far would your recollection go back in this respect?

A. Seven or eight years.

Q. Have there been other cases in which the Exchange has advised its member firms to discontinue private wire connections with non-members, other than the one which is the subject of this litigation.

A. Yes.

Q. Could you estimate about how many such cases you have a year?

A. No, because it would vary from year to year. You might not have any, and you might have six or eight in a year.

Q. How many have there been in the last five years in which you have been in your present position?

A. I could not answer that without referring to records.

Q. Would you say there have been more or less than one hundred?

A. If you want an opinion, I will say there have been far less than one hundred.

Q. Would you say there have been less than fifty?

A. I would not be nearly as sure of that.

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Q. If the Securities and Exchange Commission revokes a broker-dealer registration, does the Exchange automatically order discontinuance of private wire connections with that broker-dealer?

A. Not automatically, no.

Q. What does it do in addition to obtaining information that the broker-dealer registration has been revoked?

A. Try to find out what the revocation was based upon, whether it actually put the people out of business, whether they could still continue in some phase of business. Not all broker-dealers, you know, are subject to the SEC.

Q. Yes, I do know that. Under what circumstances might the SEC revoke a broker-dealer registration, but the Exchange nevertheless permits the continuance of private [fol. 195] wire connection with that particular firm or individual?

A. I can't think of any at the moment.

Q. Has it ever happened within your administration of this program?

A. Not that I recall.

Q. If a non-member firm or individual who is also a member of the National Association of Securities Dealers was expelled from that Association, would the Exchange automatically withdraw permission for private wire connections with that firm or individual?

A. Not automatically.

Q. Under what circumstances might it not withdraw following that action?

A. Under the circumstances that after getting all of the information that was available, considering it carefully, we would come to the conclusion that withdrawal of wire or ticker facilities wasn't warranted.

Q. Would it be correct to say, then, that regardless of the action taken by the Securities and Exchange Commission, or any other exchange or any other association of securities dealers, the Exchange in all instances will make its independent determination as to what action it deems appropriate?

A. Yes.

Q. Does the Exchange make any distinction between private wire connections by telephone, and private wire connections by teletype, telemeter, or other electronic means?

A. No, sir.

Q. Could you give me a complete, or as complete as you can make it, list of those means of communication which are covered under the Exchange's wire connection rules?

A. The rules themselves spell out several, and they also state, "or any other means of communication." The ones that would come to mind, the obvious ones, would be a private telephone wire, telemeter. I even know of two Morse wires that are still in use. Telegraph in any form.

Q. Do you mean private telegraph?

A. Yes.

Q. You would not mean a telegram sent over regular Western Union facilities from a member or non-member?

A. That would not be a private wire communication, or a comparable private means of communication.

[fol. 196] Q. Is an investigation conducted in every case where an application has been made for private wire connection with a non-member firm?

A. No, sir.

Q. Is an investigation conducted in every case in which a non-member, or non-member firm, makes application for stock ticker service?

A. No, sir.

Q. How do you determine in the first instance whether you will or will not make an investigation?

A. If the applicant already has ticker service, already has private wire service and is merely applying for additional ones, we would not make an investigation.

Q. But if there is no prior current service, such an investigation would be conducted as a matter of course?

A. Yes, sir.

Q. How does the Exchange initiate its investigative procedures?

A. I don't think I understand the question.

Q. What is the first thing they do when they decide that a particular case must be the subject of an investigation?

A. They examine the information that has been supplied by the candidate for the service. They check any files or records of our own, and then communicate either directly or through commercial agencies with past employers, business associates. We would normally also, and always in the case of a securities firm, would check with the SEC, with the Blue Sky Commission or its counterpart in any States where they operate or have operated.

• • • • • • •

Q. As part of the preliminary investigation, and if you would, please accept my terminology—we will call everything you said up to this point a preliminary investigation—does the Exchange conduct directly or through a representative, a private investigation agency, a field investigation?

A. Yes.

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Q. By field investigation, Mr. Coleman, I mean actually having an investigation or going into the field to speak to [fol. 197] people, whether they are former employers, neighbors, business associates, or what have you.

A. It is a customary procedure. It is not in any case an absolute procedure.

Q. How do you determine whether you shall use that procedure and when you shall not?

A. Whenever in our opinion it is necessary to use outside agencies for any coverage that we feel for practical

reasons we can't do as quickly, as inexpensively, or possibly at all, we use outside agencies. Again, that is purely a matter of expediency for ourselves.

• • • • • • •

Q. If the investigation procedures that you have been describing develop derogatory information with respect to the applicant's background, does the Exchange institute any further check?

A. Sometimes.

Q. And what would be the nature of that further check?

A. It would depend on what the circumstances were, and what we were trying to check, the nature of the information, and how well we thought we could check it.

Q. Does the Exchange make any independent effort to determine the reliability of the derogatory information that is received?

A. Quite possibly, yes.

Q. Does it normally?

A. Normally we try to verify everything we get.

• • • • • • •

Q. I take it then that the Exchange does not necessarily accept the truth or accuracy of derogatory information revealed in its investigative procedures?

A. Not necessarily, but it does accept in good faith information which comes to it from what it considers to be reliable sources.

• • • • • • •

Q. Is there any particular reason why the Exchange's operations with respect to private wire operations fall within this division?

[fol. 198] A. The answer to that lies within the name of the division. It is the Division of Commissions and Quotations. Quotations refer to stock quotations for transactions on the New York Stock Exchange, or bond transactions, and they are published on the tape over our ticker system.

Q. But we are now talking about private wire connections.

A. Private wires, merely because it is a means of communication, and has been for years within the bailiwick of that particular division or its predecessor.

Q. Because it is considered an extension of the quotation lines on the Stock Exchange?

A. Yes, sir, because in a great many cases private wires are used for the getting of quotations, as well as for the obtaining of orders.

Q. And by this I take it you mean quotations on securities listed on the New York Stock Exchange?

A. Yes.

Q. Does the Exchange, and particularly your Department, in any way consider the type of transactions or communications that are made over these private wires of wire connections, with respect to whether or not it will grant or deny approval of such connections?

A. To the extent that they must be all proper legal transactions, yes. As distinguished between whether they be listed or unlisted stocks or bonds or high priced or low priced securities, no.

Q. Would it be correct to say, then, that the Exchange's determination as to whether a particular connection would exist, would in no way be governed, or in no way be affected by whether or not quotations on securities listed on the New York Stock Exchange are transmitted over these wires?

A. That is correct.

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Q. Mr. Coleman, is there not a long standing Exchange policy against revealing the reasons for the denial or disapproval of wire connections in any particular case?

Mr. MacKinnon: Revealing to whom?

[fol. 199] Mr. Dickstein: Revealing to the subject, the applicant.

The Witness: Yes, sir.

Q. What is the reason for that policy, if you know?

A. Protection of sources of information would be one reason.

Q. Would there be any other reason?

A. I am sure there could be. I can't think of any at the moment.

Q. Would it be correct to say that in instances where the information is of a public nature, and the source does not require protection, the Exchange policy against reveal-

ing the derogatory information to the applicant is departed from?

A. If so, it would be very rarely.

Q. Are the Exchange's reasons for disapproval or withdrawal action ever communicated to members or member firms?

A. I don't recall of any cases.

Q. In which such communication has been made?

A. Unless, again, it were something based on a matter of public record.

* * * * * * *

Q. Is the Exchange concerned with allegations of bad morals or immorality which have no connection with securities transactions or the securities business itself?

A. I would have to answer that the same way I answered the previous question.

Q. How would you answer that?

A. In considering any application or any situation the Exchange is interested in all of the information, good, bad or indifferent. The Exchange may, after developing information, elect to use or not use any part of it. The Exchange would be, I think, more keenly interested in anything bearing upon integrity.

Q. Why integrity specifically?

A. Because again our primary objective is to protect the public interest.

Q. In securities transactions?

A. In transactions of any kind with people who are mem- [fol. 200] bers or who are enjoying any of the privileges of membership, or any of the facilities of the Exchange.

Q. By privileges of membership, or facilities of the Exchange, you mean to include private wire connections between members and non-members?

A. I mean to include the people who were on the other end of the wire, yes.

Q. When you say facilities, do you mean to include the private wire connection between a member and a non-member—the connection itself?

A. Yes.

Q. In determining whether or not a particular applicant will be approved for either private wire connections or

stock ticker service, does the Exchange concern itself solely with its belief or impression as to how that individual or firm making application will behave with respect to securities transactions?

• • • • • • •

Q. I will add to that question, such belief or impression being formulated on the basis of the prior history, background, etcetera, as revealed by the investigation process.

A. I don't think I can answer it categorically. Certainly in formulating its decision, the Exchange would take into consideration the past background and past performance of any candidate for facilities. I think depending then upon the circumstances, what that background was the individuals, and everything else that the Exchange had developed about those individuals, good, bad and indifferent, the Exchange would come to a decision.

Q. But would that decision focus upon the answer in your own mind to the question, how will this individual or firm behave with respect to securities transactions?

A. Not entirely. To some extent I am sure it would, but there is also the broader aspect. I mentioned several times the Exchange is very proud of its reputation, is very proud of the part it plays in the world economy and the part it plays in protecting the interests of the investing public. It doesn't want to jeopardize that position or that reputation, [fol. 201] so I think that is another one of the factors that would enter into any consideration.

• • • • • • •

Q. In this particular case, and I am speaking of the withdrawal of approval of private wire connections and stock ticker service furnished to Municipal Securities Company, a proprietorship, and Municipal Securities Company, Inc., a corporation—was the subject of the investigation ever called upon to make or give any explanation of any derogatory information prior to the withdrawal of approval of the connections?

• • • • • • •

Q. By the Exchange.

A. Not to the best of my recollection. This happened

sometime ago, and a lot of applications passed over my desk.

Q. Would an examination of your file reveal whether or not any letter or telegram had ever been sent to the subjects of the investigation prior to the withdrawal action, with respect to or in request of an explanation of derogatory information?

A. It should show.

Q. Can you examine your file and ascertain?

Mr. MacKinnon: Any file of the character you are speaking about has been submitted to you for discovery and inspection. The only thing that has been withheld are the reports that Judge Bicks stated would be available to you on certain specified conditions.

Q. Did you, Mr. Coleman, personally ever ask the subject or subjects of this investigation for an explanation of the derogatory information turned up by your investigation?

A. To the best of my recollection, I never asked any of the principals specifically or directly for an explanation. Mr. Silver came in to see me on one occasion after this action, and I invited him at that time to tell me anything at [fol. 202] all he felt free to tell me, or felt might help us to have a better picture of the situation.

Q. Did Mr. Silver make a request that he be furnished with the reasons or basis for the Exchange's action?

A. Yes, he did to me.

Q. And was that request declined?

A. It was declined. This was an oral request.

Q. During his conference with you?

A. Yes.

* * * * * * *

Q. Do you recall the date on which that conference took place?

A. No, I don't recall the date. The file would show it. Again, I see many people during the day. There have been a lot of days that elapsed since then.

Q. Do you recall whether that conference was subsequent to the withdrawal action?

A. It is my belief that it was subsequent to our withdrawal of approval.

• • • • • • •

Q. Is it your custom to make such report to the SEC when this type of action has been taken?

A. It is our custom to report disciplinary actions of all sorts to the SEC.

Q. And do you know specifically whether this action was reported?

A. No, I don't, sir.

Q. Would you characterize this as disciplinary action?

A. In a very broad sense, yes, within the meaning of my previous characterization.

Q. Is this type of action a disapproval of private wire connection to a non-member firm, or a withdrawal or disapproval of stock ticker service to a non-member firm, normally communicated to the Securities and Exchange Commission by the Exchange?

• • • • • • •

A. As a normal procedure, as I mentioned before, we report to the SEC any actions which are of a disciplinary nature, or anything comparable to a disciplinary nature.

[fol. 203] Q. Including this type of action?

A. Including this type.

• • • • • • •

Q. When you customarily notified the Securities and Exchange Commission of disciplinary proceedings which have been taken, do you also advise the Commission of the reasons why you took such action?

A. On occasion.

Q. This is not the rule?

A. May I again qualify the answer? It is our custom to advise the SEC formally of every disciplinary action taken against a member firm, an allied member, or in some cases, employees of member firms—certain classes of employees, not all. That is done formally. It is our custom normally to inform the SEC informally of other proceedings or procedures or actions we have taken, of types which would include this type of action, not limited to this type.

Q. And in communications to the SEC of actions of this type, would you normally give the SEC the reasons why you have done what you have done?

A. Not unless they asked for it.

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Q. Which SEC office is advised when you do advise the Securities and Exchange Commission of action taken?

A. As a matter of normal practice, it would be the New York office. As a matter of occasional convenience, if we happen to be talking to someone in the Washington office, and we are in frequent communication with them in either direction, it is quite possible that we might pass it to them, because eventually all the information goes to them from the regional offices.

• • • • • • •

Q. You will either notify New York or Washington?

A. As a general rule.

Q. As a rule it will be New York?

A. Yes. Washington may call us later and say, "What is it all about?" It is possible also—I don't recall in this specific case—but it is possible that the Securities Commis- [fol. 204] sion of any State, the Blue Sky Commission, might ask us formally or informally if we had taken such an action, because they may have heard of it in some other way.

Q. If such an inquiry is made by a State commission, do you furnish the State commission with the reasons for the action taken?

A. Not normally.

Q. If they request the reasons do you furnish it to them?

A. It would depend on what the reasons were.

Q. There are certain reasons which you would not reveal to a State commission?

A. I am sure there are. At the moment I could not distinguish between which we would and which we would not.

Q. Are there certain reasons which you would not reveal to the Securities and Exchange Commission?

A. I can't think of any.

Q. As between yourselves and the Securities and Exchange Commission there would tend to be full disclosure if disclosure were requested?

A. Yes. We are under the direct supervision of the Securities and Exchange Commission, as an exchange. We are not under the State supervision as an exchange as such.

Q. Do you make full disclosure to other exchanges requesting information of this character?

A. When you say full disclosure, you mean all?

Q. Including all the reasons, if they ask for it.

A. Again, it would depend on the reasons.

Q. Do you advise other exchanges of the fact that you have taken such action, if they make an inquiry?

A. If they make an inquiry we might. We would not do it gratuitously.

Q. You do not, I take it, disseminate in any broad form this information to anyone?

A. No. Only the people who we think are required to know about it.

Q. Do you disseminate it to member firms other than those who have pending or granted applications for private wire connections?

A. Not per se. It is possible some firm might come in with an application or call us and say, I want to put in an [fol. 205] application. Can I put in a wire. It is quite possible, and we would say no.

Q. But there is no list of firms with whom member firms are not permitted to have private wire connections?

A. Good heavens, no.

Q. Do you maintain such a list in your own office—in your own Department?

A. We do not, nor to the best of my knowledge, do we maintain one in any department of the Exchange.

* * * * * * * *

Q. Mr. Coleman, I ask you once more to look at Rule 358, paragraph 2358.13 of the Rules of the New York Stock Exchange. The record should show when I refer to paragraph numbers, I am referring to paragraph numbers in the C. C. H. Edition of the Exchange's Constitution and Rules.

A. All right, sir.

* * * * * * * *

Q. Mr. Coleman, perhaps we should get a fresh start on this. Are you saying that this rule applies to any means of communication whatsoever, whether private or public?

. . . . . .

Q. In your opinion.

A. In my opinion, the answer is yes. With respect to business, and I quote the language, " . . . any business, directly or indirectly with or for any illicit or illegal organization, to any organization, firm or individual making a practice of dealing on differences in market quotations, or, 3, any organization, firm or individual engaged in purchasing or selling securities for customers and making a practice of taking the side of the market opposite the side taken by the customers."

Q. What is meant by the word "business"—business transmitted—in your opinion?

A. I don't think I can define it any better than Mr. Webster or Funk & Wagnall define it.

Q. What kind of business are you thinking of?

Mr. MacKinnon: Anything the Stock Exchange can possibly do.

[fol. 206] Q. I take it the rule would not prohibit a member firm from buying stationery from an organization, firm or individual which makes a practice of dealing on differences in market quotations?

Mr. MacKinnon: You know the only thing it relates to is a regulation of a market for securities. That is the only purpose of the Stock Exchange, so let's not be preposterous about it.

Q. Do you adopt Mr. MacKinnon's answer?

A. I adopt it with some additions. I can conceive also if you were doing an illegal gambling business over the wire, we would certainly object to it.

Q. Any illegal gambling business relating to quotations on the New York Stock Exchange?

A. Relating to anything. Primarily Mr. MacKinnon's idea covers it.

Q. Would the business referred to in the rule, in your opinion, relate also to transactions in securities which are not listed on the New York Stock Exchange?

. . . . . .

A. I think the answer would be yes.

Q. It would apply to transactions in securities even though those securities are not listed on the New York Stock Exchange?

A. The member is still a member.

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Q. Mr. Coleman, would you advise me when you received a report in response to the Exchange's request for further investigation?

A. We received several under different dates. I couldn't tell you the receipt date, but I can tell you the dates of the reports. One was April 14th; one was April 22nd; and one was May 1st. There may have been two on May 1st—in 1959, of course, all of these dates.

Q. Did these reports confirm the derogatory information previously given to you?

A. In my opinion they did, sir.

Q. Was there any portion of the derogatory information which had been previously given to you that was refuted by these reports?

A. None.

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[fol. 207]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM THE N. Y. S. E. CONSTITUTION AND RULES

[The following material is taken from the 1959 C. C. H. edition of the New York Stock Exchange Constitution and Rules. The numbers in parentheses refer to the pages of that edition.]

CONSTITUTION:

Article III, Sec. 6 (1056):

"The Board of Governors • • • shall have supervision over all matters relating to the collection, dissemination and use of quotations and of reports of prices on the Exchange and Shall have power to approve or disapprove any application for ticker service

to any non-member, or for wire, wireless, or other connection between any office of any member of the Exchange, member firm or member corporation and any non-member, and may require the discontinuance of any such service or connection."

Article XIV, Sec. 6 (1087):

"A member or allied member who shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of a violation of the Constitution of the Exchange or of a violation of a rule adopted pursuant to the Constitution or of a violation of a resolution of the Board of Governors regulating the conduct or business of members or allied members or of conduct or proceeding inconsistent with just and equitable principles of trade may be suspended or [fol. 208] expelled as the Board may determine."

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Article XIV, Sec. 10 (1088):

"A member or allied member who shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of any act which may be determined by the Board of Governors to be detrimental to the interest or welfare of the Exchange may be suspended for a period not exceeding five years."

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Article XIV, Sec. 14 (1089-1090):

"An accusation, charging a member or an allied member before the Board of Governors with having committed an offense, shall be in writing; it shall specify the charge or charges against such member or allied member with reasonable detail, and shall be signed by the person or persons making the charge or charges. A copy of such charge or charges shall be served upon the accused member or allied member either personally, or by leaving the same at his office address during business hours, or by mailing it to

him at his place of residence. He shall have ten days from the date of such service to answer the same, or such further time as the Board may deem proper. The answer shall be in writing, signed by the accused member or allied member, and filed with the Secretary of the Exchange. Upon the answer being filed, or if the accused shall refuse or neglect to make answer as hereinbefore required, the Board shall, at a regular or special meeting thereafter, proceed to consider the charge or charges; if such meeting be a special meeting, [fol. 209] notice of the object thereof shall be sent to all Governors. Notice of such meeting shall be sent to the accused; he shall be entitled to be personally present thereat, and shall be permitted in person to examine and cross-examine all the witnesses produced before the Board and also to present such testimony, defense or explanation as he may deem proper. After hearing all the witnesses and the accused, if he desires to be heard, the Board shall determine whether the accused is guilty of the offense or offenses charged. If it determines that the accused is guilty, the Board may fix and impose the penalty and a written notice of the result shall be served upon said member or allied member in the manner hereinbefore provided. The findings of the Board shall be final and conclusive."

* * * * * * *

RULES

Rule 355 (3611):

"(a) No member or member organization shall establish or maintain any wire connection, private radio, television or wireless system between his or its offices and the office of any non-member, or permit any private radio or television system between his or its offices, without prior consent of the Exchange.

(b) Every non-member will be required to execute a private wire contract in form prescribed by the [fol. 210] Exchange to be filed with it, unless a contract is already on file with the Exchange.

(c) Notification regarding a private means of communication with a non-member and the signed contract when necessary shall be submitted to the Department of Member Firms. This notification, by a member or allied member, may be in form supplied by the Exchange or in letter form, and shall include the essential facts concerning the non-member and the means of communication.

(d) Each member or member organization shall submit annually to the Department of Member Firms a list of all non-members with whom private means of communication are maintained.

(e) The Exchange may require at any time that any means of communication be discontinued."

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Rule 356 (3611):

"The Exchange may require at any time the discontinuance of any means of communication whatsoever which has a terminus in the office of a member or member organization. * * *."

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[Supplementary Material following Rules 355 to 358]:

Rule 358 [¶ 2358.10] (3612):

"* * *

Where a non-member requests a member organization to obtain or transmit quotations or orders in unlisted securities between the non-member and other organizations over a wire paid for by the member [fol. 211] organization and the member organization, instead of effecting the transactions, gives up the name of the non-member who confirms directly with the other party, the member organizations must make a per share charge in connection with the transactions."

* * * * * * *

Rule 358 [¶ 2358.13] (3612):

"Prohibited wire connections.—No member, allied member or member organization may utilize any private or public wire connection or any other means of communication whatsoever to transmit any business directly or indirectly with or for:

(1) Any illict or illegal organization;

(2) any organization, firm or individual making a practice of dealing on differences in market quotations; or

(3) any organization, firm or individual engaged in purchasing or selling securities for customers and making a practice of taking the side of the market opposite to the side taken by the customers."

[fol. 212]

EXCERPTS FROM ORAL ARGUMENT IN DISTRICT COURT

Mr. MacKinnon: Now let us deal with the next phase of this thing. They had two companies in Dallas: Municipal, Inc., the corporation, and Municipal, the sole proprietorship.

Without asking for the Stock Exchange to approve a wire connection Municipal, in 1956, tied up wires to certain member firms in Dallas. In 1958 they did us the courtesy, at least, of applying, and it was in 1958 that we gave the temporary approval.

So that from 1956 down to the date the wires were withdrawn there wasn't even any approval for the wires which Municipal had with member firms of the Exchange, and only the temporary approval with respect to Municipal, Inc.

These people went into the municipal bond business through the sole proprietorship and the over-the-counter securities business through the corporation.

* * * * * * *

The Court: * * * Now, before you get to the question of damages, as far as I can gather, the basis of the Stock Exchange's defense is that its action was reasonable.

Mr. MacKinnon: In large part.

The Court: Now, is there anything else relied on that you intend to present to the Court?

Mr. MacKinnon: I am certainly going to discuss it with you at the end of this argument.

The Court: Mr. MacKinnon, then, perhaps we had better wait until then, because I want to know exactly what I am going to have before me.

Mr. MacKinnon: Well, I have to discuss it with you.

The Court: All right.

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[fol. 213] Mr. MacKinnon: I do just want to state this: The investigation that we undertook here was not an investigation that was singular to Municipal and Municipal, Inc. This is an investigation that was undertaken with respect to people who applied for private wires, to people who applied for ticker service, so that we did not single them out.

Now, what did we do with respect to the conduct of the investigation? We turned to people who are in that field. This is their daily life. We turned to them and asked them to turn up the information that they have.

We have used them for many years. We believe they are reliable and we relied on them. We relied on them in the past. This was not something that was done by hit or miss. This is something that was done with seasoned deliberation in this case, as in all cases.

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Mr. MacKinnon: I say, Your Honor, there is no such thing as my adversary says. He is not a member of the Exchange, and never was, and I say that the only test—the only test to be applied is: Did we act reasonably?

And I don't know how you can act reasonably if you don't entrust your reputation to people whom you believe to be competent, and if the Defense Department is not a reliable source of information for it, I don't know what could be.

The Court: All right. Now I am coming back to my question.

Mr. MacKinnon: Yes.

The Court: Can we start with what else do you plan to submit and under what circumstances?

Mr. MacKinnon: Well, the situation is such that I feel Your Honor would have to make the ground rules. However, I would like to do this, and I don't think that it is an unreasonable request. I would like to go back and discuss [fol. 214] it with my clients, because although I think that some of my papers in and of themselves, without more, do show the reasonableness of their investigation, yet—

The Court: I am not going to pass on that at this point.

Mr. MacKinnon: I know you are not going to but at the same time—

The Court: I will pass on it some time later.

Mr. MacKinnon: I know you are not going to pass on it at this point, but if Your Honor wants to make a direction of that here and now, that I am to submit it to my adversaries, I will be glad to submit it.

The Court: No. I will not do any such thing as that. I will say to you now that anything that you wish to submit to the Court under this motion will have to be submitted to your adversaries.

Mr. MacKinnon: No. I am positive of that.

The Court: That is as far as I will go.

Mr. MacKinnon: Well, will you let me have forty-eight hours on it?

The Court: Yes. I will let you have forty-eight hours on it.

Mr. Shapiro: No objection, Your Honor.

The Court: I take it that you people are going to be around, aren't you, here in New York?

Mr. MacKinnon: Mr. Shapiro goes back to Washington, I imagine.

Mr. Shapiro: I will be going back to Washington, but, of course, I believe that we can arrange it.

Mr. MacKinnon: Yes, we can arrange it.

The Court: All right.

Mr. MacKinnon: Now, they have submitted a brief and I am very frank to say that I have not had the time to go into it. I got that this morning, and I would like to have, if it is possible to do so, until Monday morning to reply to it.

[fol. 215] The Court: I will give you until Monday morning.

Mr. Shapiro: No objection, Your Honor.

Mr. MacKinnon: And the same if I want to put anything in in reply to the affidavit.

The Court: Yes.

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The Court: All right, gentlemen, I will take it under advisement, and we will leave it this way for the time being: Mr. MacKinnon will have until next Monday to decide what further he is going to submit with the understanding that anything—that anything that he submits to me—

Mr. MacKinnon: That is right.

The Court: —goes plainly to the other side.

Mr. MacKinnon: Yes.

Mr. Shapiro: And may I have five days in which to reply with respect to that, Your Honor?

The Court: All right, but I don't want to be receiving too many replies.

Mr. Shapiro: I have already replied to some extent on it, Your Honor.

Mr. Dickstein: This would go to new material, Your Honor.

The Court: In connection with any new material he submits, you certainly will have the same opportunity to reply to it, and I will give you five days.

Mr. Shapiro: Thank you very much.

[fol. 216]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM DECISION OF DISTRICT COURT—May 19, 1961

Bryan, District Judge:

Plaintiffs Harold Silver, doing business as Municipal Securities Company, and Municipal Securities Company, Inc., have moved, upon the first claim stated in the com-

plaint, for partial summary judgment under Rule 56(c), F. R. C. P., for a permanent injunction under Section 16 of the Clayton Act and, in the alternative, for a preliminary injunction under Section 16 of the Clayton Act and Rule 65, F. R. C. P. These motions present complex and novel issues. My opinion on them has been in preparation for some time and will be filed shortly. However, in fairness to the litigants I am now issuing this memorandum of my decision.

The first claim stated in the complaint embraces two distinct and separate claims which must be dealt with separately. The first relates to the acts of the defendant Exchange in requiring its members to withdraw private wire and telemeter connections between them and the plaintiffs. The second relates to the acts of the defendant Exchange in refusing to continue to furnish to plaintiff Municipal Securities Company, Inc., its continuous stock quotation ticker service.

With respect to the claim relating to private wire and telemeter connections I hold that pursuant to Rule 56(c) plaintiffs are entitled to partial summary judgment against the defendant determining that defendant is liable to plaintiffs under Sections 4 and 16 of the Clayton Act and that plaintiffs are entitled to a permanent injunction enjoining defendant from requiring its members to discontinue private wire and telemeter connections with the plaintiffs and [fol. 217] from interfering with the establishment and maintenance of such connections.

With respect to the claim relating to the stock ticker service I hold that plaintiff Municipal Securities Company, Inc. is not entitled to partial summary judgment pursuant to Rule 56(c). However, I hold that such plaintiff has established its right to a preliminary injunction under Section 16 of the Clayton Act and Rule 65, F. R. C. P. restraining defendant, pending the final determination of this action, from refusing to make available to such plaintiff its continuous stock quotation ticker service.

Appropriate provision for the entry of orders implementing this decision will be made in the opinion to be filed which will also contain my findings and conclusions.

Frederick vP. Bryan, U. S. D. J.

Dated: New York, N. Y., May 19, 1961.

[fol. 218]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION—June 16, 1961

Bryan, District Judge:

Municipal Securities Company is a sole proprietorship owned by plaintiff Harold Silver, engaged in the securities business, almost entirely in municipal bond transactions. Plaintiff, Municipal Securities Company, Inc. is a corporation organized under the laws of the State of Texas, also [fol. 219] engaged in the securities business, principally in the over-the-counter securities market.

Defendant, New York Stock Exchange is a New York unincorporated association with an authorized membership of 1375. The Exchange provides facilities for its members and their firms to trade in corporate securities listed by it. While the actual trading takes place on the floor of the Exchange in New York, its members do business on a nationwide scale. It is the largest and most important of the national stock exchanges. The Exchange has it principal office and trading facilities at 11 Wall Street in the City of New York.

This suit arises out of the actions of the Exchange in directing a number of its member firms to discontinue private wire and telemeter connections with the plaintiffs and in refusing to continue to furnish plaintiff Municipal, Inc. with its continuous stock ticker quotation service.

The complaint states three separate claims. The first is laid under Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, and alleges in substance a conspiracy between the defendant Exchange and various of its member firms, named as co-conspirators but not as parties, to deprive the plaintiffs of their private wire and telemeter connections with such member firms and of the stock ticker service, all to plaintiffs' substantial competitive disadvantage and in violation of the Sherman Act, 15 U. S. C. § 1, et seq.

The second and third claims sound in tort and allege that the Exchange tortiously induced its members to breach

contracts for wire connections with plaintiffs and caused plaintiffs intentional and wrongful harm without reasonable cause.

We are concerned here only with the first claim under the anti-trust laws. Plaintiffs have moved for partial summary judgment on the first claim under Rule 56(a) and (c), F. R. C. P., and for such further relief as may be appropriate. Plaintiff Municipal has also moved for preliminary injunctive relief under Section 16 of the Clayton Act. [fol. 220] The motions are before me on voluminous affidavits submitted by both sides and a volume of supplementary material.

Jurisdiction over the first claim is based on 15 U. S. C. § 15.

On May 19, 1961 I filed a memorandum stating without opinion my holdings on these motions. This is my opinion.

Facts.

There is no genuine dispute as to the following facts.

In 1955 plaintiff Harold Silver commenced business as a broker/dealer in securities in Dallas, Texas. The business consisted almost entirely of transactions in municipal bonds. It was conducted under the name of Municipal Securities Company (Municipal). Municipal also had branch offices in Lubbock, San Antonio, Longview and Amarillo, Texas.

In 1958 Silver organized Municipal Securities Company, Inc. (Municipal, Inc.) to engage in transactions in corporate securities. Its principal business was in the over-the-counter securities market.

By February 1959 Municipal had sixteen employees and in 1958 had done a gross volume of transactions of $54,607,000. Municipal, Inc. had seven employees and for the seven months prior to February 1959 its volume of trading in over-the-counter securities was $6,850,000.

Both plaintiffs were licensed as securities dealers under the laws of Texas. They were also registered with the Securities and Exchange Commission as broker/dealers and both are members in good standing of the National Association of Security Dealers. They are not members of the New York Stock Exchange.

The 1375 authorized memberships in the New York Stock Exchange (the Exchange) are held by individuals. There are also a large number of member firms, member corporations and allied members.

[fol. 221] Member firms are partnerships transacting business as brokers or dealers in securities, at least one of whose general partners is a member of the Exchange. Member corporations are corporations engaged in the securities business which have one or more directors who are members of the Exchange. The Exchange also has an allied membership consisting of general partners in member firms or owners of voting stock in member corporations.

The Exchange lists select corporate securities which include those of many of the country's largest and most important corporations. It provides a quality market for its members to execute orders for the purchase and sale of securities so listed for their own accounts and for the accounts of customers. The Exchange also lists a few select municipal bonds.

The market price for a listed security is established by auction on the floor of the Exchange. Market prices are in a constant state of flux, many of them rapidly changing from moment to moment. The market is extremely sensitive to variations in price, even slight fluctuations causing spurts of buying and selling.

The prices of securities listed by the Exchange and traded in on its floor are supplied by continuous stock quotation service which goes by ticker to member firms, to many non-member broker/dealers and to various other places where such quotations are of interest. The ticker provides up to the minute quotations of the prices at which listed securities are being currently traded on the floor of the Exchange. The service is carried over the facilities of the Western Union Telegraph Company and is for purposes of information only.

A large number of securities are not listed either on the New York Stock Exchange or on the other national exchanges. These securities are dealt in on the so-called over-the-counter market and are known as over-the-counter securities. The market price for over-the-counter securi-

[fol. 222] ties is established by traders at their desks in the

numerous firms dealing in securities throughout the country. Such traders are in constant communication with their counterparts in other firms seeking buyers or sellers in particular securities at the best price available. There is no central trading place for over-the-counter securities. The market in them is established by the offers to buy and sell which are communicated between traders. Thus the supply and demand of the over-the-counter market establishes the going bid and asked prices for any particular security at any particular moment of the trading day.

Extensive communication networks facilitate trading in securities. The principal medium which firms engaged in the securities business use to communicate with one another is the private wire connection. This is a direct telephone wire over which traders may instantly communicate with one another to exchange information and transact business. A trader in one firm can establish contact with a trader in another simply by flipping a switch.

Depending on the number of wire connections a firm may have, a single trader in over-the-counter securities can, by using different switches on a board before him, make offers to buy or sell and obtain offers from a variety of other firms within a matter of seconds. These are direct circuits and no dialing or waiting is necessary. Thus traders have the ease and speed of immediate and direct communication. Similar communication is also carried on by direct telemeter or teletype and, in addition, some business is transacted by the more usual means of business communication.

While many dealers in over-the-counter securities are not members of the Exchange many of the member firms and corporations, including those involved here, do an extensive business in over-the-counter securities and unlisted municipal bonds. Private wire connections between over-the-counter securities dealers, who are not members [fol. 223] of the Exchange, and member firms, facilitate transactions between them in unlisted securities and municipals, and also provide facilities by which customers of non-member firms who desire to purchase or sell listed securities can have their orders transmitted to member firms for rapid execution.

In September 1956 direct private wires were installed between the offices of Municipal and the municipal bond departments in the Dallas offices of Merrill Lynch, Pierce, Fenner & Beane, and Rauscher, Pierce & Company, who were members of the New York Stock Exchange. In May 1958 a direct private wire was installed between Municipal and Dallas Union Securities Company, which at a later date became a member of the Exchange.

The cost of these wire connections with Rauscher, Pierce and Dallas Union was charged to Municipal by Southwestern Bell Telephone Company at $5 and $6 per month respectively.

In June 1958 Municipal, Inc. applied to the Exchange for the approval of private wire connections with the Dallas offices of the following member firms of the Exchange: Rauscher, Pierce & Company; Dallas, Rupe & Son; Eppler, Guerin & Turner; Merrill Lynch, Pierce, Fenner & Smith; Sanders & Co.; Harris Upham & Co.; Goodbody & Co.; E. F. Hutton & Co.; Schneider, Bernet & Hickman. Each of these firms, except Merrill Lynch, Pierce, Fenner & Smith, also requested permission from the Exchange to install such private wire connections. Between June and August of 1958 the Exchange granted temporary approval for the installation of connections with all nine firms. Direct private wires were then installed at no cost to Municipal, Inc., the installation and service costs being borne by the member firms with whom the connections were maintained. A private wire connection was also installed with Dallas Union Securities Company.

In June 1958 Municipal, Inc. applied to the Exchange for the installation of its stock ticker service. The Exchange [fol. 224] granted temporary approval and the ticker service was installed in July 1958. Municipal, Inc. was billed monthly by the Exchange for this service.

In October 1958 Municipal, Inc. made arrangements with Straus, Blosser & McDowell, a member firm of the Exchange, for a direct Western Union telemeter connection with Straus, Blosser's New York office. This connection received temporary approval by the Exchange and was installed by Straus, Blosser at its own cost.

The connection was used by both firms for obtaining quotations and transacting business in both over-the-counter and listed securities. Municipal, Inc. guaranteed a minimum of $1,000 a month in commissions on listed securities business to Straus, Blosser. The business in listed securities placed with Straus, Blosser was handled by Municipal, Inc. as an accommodation for its own customers and all commissions earned went entirely to the Straus firm.

The other member firms with whom plaintiffs maintained private wire connections also received the entire commissions on all orders for listed securities placed through them.

Thus, as of February 1959, plaintiffs had had for some time the following means of direct communication with various member firms of the Exchange: Municipal had three private wire connections with the municipal bond departments of member firms; Municipal, Inc. had ten private wire connections with the corporate securities departments of member firms, and a direct Western Union telemeter connection with Straus, Blosser in New York. Municipal, Inc. also had the Exchange's stock ticker service.

On February 12, 1959, without any notice whatsoever to either of the plaintiffs, the Exchange sent duplicate letters to eight of the ten member firms having direct wire connections with them and to Straus, Blosser with whom [fol. 225] Municipal, Inc. had its private telemeter connection. The letters advised that temporary approval for such connections had been withdrawn and directed that such connections be discontinued at once. Merrill Lynch was advised to the same effect by telephone, and Dallas Union Securities Company received the same advice by mail on February 24, 1959. By March 2, 1959 each of the member firms had complied with this directive and had severed all private wire and telemeter connections with the plaintiffs.

On February 13, 1959 the Exchange notified Municipal, Inc. that its application for stock ticker service had been disapproved and that the temporary approval previously granted was withdrawn. Western Union Telegraph Company was directed to discontinue the service as of February 18, 1959 and did so.

The action of the Exchange requiring the discontinuance of plaintiffs' wire and telemeter connections with its member firms and the withdrawal of the ticker service, was taken pursuant to Article III, §6, of its constitution, and its Rules 355, 356 and 358. Article III, §6, of the constitution provides in substance that the Board of Governors of the Exchange has the power to approve or disapprove any application for ticker service to a non-member and any wire connections between any office of any member firm or member corporation and any non-member, and may require the discontinuance of any such service or connections. Rules 355 and 356, administered by the Exchange's department of member firms, provide that no wire connections shall be established by member firms without the prior consent of the Exchange and on a form prescribed by it. They require that information concerning such arrangements be furnished periodically by member firms and provide that the Exchange may direct at any time that any means of communication which has a terminus in the office of member firms be discontinued. Rule 358 provides for applications by non-members for ticker service.

[fol. 226] On their face the constitution and rules purport to confer upon the Exchange an absolute power to approve or disapprove all wire connections and ticker service with non-member firms and to require that such connections and services be discontinued in its absolute and uncontrolled discretion.

The Exchange gave no explanation for the action which it had taken to either the plaintiffs or to any of its member firms. Silver learned of what had occurred through a telephone call from Straus, Blosser on the morning of February 13. He immediately telephoned the Exchange for an explanation. He talked to Platow, the assistant manager of the Exchange's department of member firms, who told him in substance that the Exchange did not give reasons for disapproval or withdrawal of wire and ticker connections.

On February 16 Silver came to New York and talked to Walter Coleman of the department of member firms, who informed him that it was the firmly established policy of the Exchange not to give reasons or explanations for its

disapproval of applications or its directives requiring the withdrawal of private wire connections and stock ticker service. This was the attitude of the Exchange throughout. All efforts by Silver to obtain reasons or explanations from the Exchange or an opportunity to meet any charges which had been made against him were met with categorical refusal. Efforts on his behalf by various of the member firms affected to obtain similar information were also unavailing.

On February 26, 1959 Silver wrote to Keith Funston and Edward Werle, respectively president and chairman of the Board of Governors of the Exchange, stating:

> "I feel that it is most imperative that I be advised of the reasons for the discontinuance of our wires and stock ticker service in order that we may have the opportunity to set forth our position.
> [fol. 227] "I appeal to your sense of justice and ask for the following: (1) Temporary reinstatement of the services, (2) that we be advised of the reasons for the action of the New York Stock Exchange, and (3) that we be given an opportunity to answer any charges and present whatever information you may require."

Six days later, on March 4, Funston replied:

"Dear Mr. Silver:

"Thank you for writing to me about your problem.

"While I can understand your position in wanting to know specific reasons for the recent action taken by the Exchange in connection with private wire and ticker service to your organization, I am sure you can also understand our position in declining to furnish such details.

"Before taking any such action, the Exchange always makes a very careful and very thorough investigation.

"I have personally reviewed the scope and results of such investigation in this case, and feel that the Exchange acted properly.

Sincerely,

G. Keith Funston"

On March 9, 1959 Werle wrote Silver to the same general effect.

At Silver's request various of the member firms with whom plaintiffs had had connections, other securities dealers, Dallas banks and leading New York banks, wrote to the Exchange stating in substance that their business dealings with plaintiffs had been entirely satisfactory, that plaintiffs had an excellent reputation, and were considered [fol. 228] to be responsible, of integrity and of good financial standing.[1] The position of the Exchange remained unchanged.

Plaintiffs then brought this action.

The Positions of the Parties.

On their motions for partial summary judgment plaintiffs contend that there is no genuine issue of material fact as to the liability of the Exchange on their claims under the anti-trust laws and that as a matter of law

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[1] The following letter from The Chase Manhattan Bank, dated March 19, 1959, is representative of letters sent to the Exchange:

"New York Stock Exchange
11 Wall Street
New York 5, New York

"Dear Sirs:

"It is our pleasure to write to you in behalf of the Municipal Securities Company of Dallas, Texas. While this firm is not a depositor of ours, it has been well and favorably known to us for some time.

"Our Bond Department has had transactions with the Municipal Securities Company in the form of municipal underwriting, syndicate and dealing operations which were always handled in an exemplary manner by the subject. Several of the principals are personally known to us and are considered to be men of ability and integrity.

"In short, we have a high regard for both the firm and its management, and are pleased to commend them to you as proper and responsible parties with which to have business dealings.

Yours very truly,

s/ John C. Senholzi
John C. Senholzi
Assistant Vice President"

they are entitled to judgment on all issues raised by that claim except those as to the damages to which they may be entitled. They seek a final determination that the defendant is liable to them under Section 4 of the Clayton Act[2] for such treble damages arising out of the acts complained [fol. 229] of as they may be able to establish on a trial and that they are also entitled to a permanent injunction under Section 16 of the Clayton Act[3] enjoining the Exchange from interfering with the maintenance and operation of their private wire connections with member firms and from refusing to furnish Municipal, Inc. with the stock ticker service.

In essence, plaintiffs contend (1) that the conduct of the Exchange and its members in denying them private wire and telemeter connections constitutes a concerted refusal to deal with them and is thus a per se violation of Section 1 of the Sherman Act;[4] and (2) that the dis-

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[2] 15 U. S. C. §15; "Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[3] 15 U. S. C. §26: "Injunctive relief for private parties; exception

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *."

[4] 15 U. S. C. §1: "Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

continuance of the stock ticker service is a per se violation of Section 2 of the Sherman Act[5] since it constitutes a misuse of monopoly power which gained a competitive advantage for Exchange members over the plaintiffs in the over-the-counter securities market, and that it is also a concerted refusal to deal under Section 1.

The plaintiffs say that their private wire connections are the principal means by which over-the-counter trading [fol. 230] is accomplished and information on prices and transactions is obtained, and that the stock ticker service is the only practicable method by which they and their customers can be kept informed of the current prices and volume on the floor of the Exchange. They say that both their wire connections and the ticker service are facilities which are necessary in order to permit them to compete effectively as securities dealers in their respective fields. They contend that the withdrawal of these connections and services placed them at a substantial competitive disadvantage vis-a-vis other security dealers, including member firms of the Exchange, and resulted in a serious loss of business. They also claim that as a direct consequence of what was done by the Exchange they were forced to expend monies in attempting to obtain substitute means of communication for those which were discontinued.

The Exchange denies any illegal conduct. It claims that as a National Stock Exchange it is a regulated industry under the Securities Exchange Act of 1934, 15 U. S. C. § 78(a), et seq., and that it is exempt from the anti-trust laws to the extent it is so regulated. The constitution and rules of the Exchange were required to be and were filed with the Securities Exchange Commission at the time the Exchange registered with that body under the 1934 Act. Similar action was required and taken as to any rules subsequently adopted. (15 U. S. C. § 78(f).)

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[5] 15 U. S. C. §2: "Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

The Exchange urges that the acts of which the plaintiffs complain were done pursuant to its constitution and rules as duly filed with the Commission and that therefore they are outside the scope and operation of the anti-trust laws.

The Exchange contends further that even if the acts complained of are not exempt from the anti-trust laws there has not been a concerted refusal to deal in violation of such laws under the facts and circumstances of this case. [fol. 231] Finally, the Exchange asserts that under no circumstances can its conduct here be viewed as a per se violation of the Sherman Act. It contends that its conduct must be viewed in the light of the rule of reason and was reasonable within the meaning of that rule.

It was not until after suit was commenced that plaintiffs were able to obtain any information as to the reasons for the action taken by the Exchange. During the course of the rather extensive discovery proceedings conducted prior to making the present motions some idea of these reasons began to emerge. However, even then the basis on which the Exchange purported to have acted was not fully disclosed.

On this motion the Exchange states the following to be the reasons for the action which it took:

1. Investigation by the Exchange had disclosed certain matters derogatory to the Silvers upon which the Exchange relied but which it asserted to be confidential and refused to reveal. The Exchange has taken the position that it would not disclose such material unless so directed by the court or unless the plaintiffs were willing to execute releases undertaking not to sue the Exchange, its investigating agencies or its sources of information for libel or slander.

During the course of the argument of this motion before me counsel for the Exchange requested the court to receive in camera the "confidential" material relating to its investigation which he said contained "scurrilous matter with respect to the Silvers", without disclosing it to the plaintiffs. I refused to receive the material on such a basis and advised counsel that it was entirely up to the Exchange whether the material was submitted or not but that the

material would not be received unless it was disclosed to the plaintiffs and the plaintiffs given an opportunity to answer it. Defendant's counsel was given time to consider further whether such material would be submitted. It has not been submitted and neither the court nor the plaintiffs know what it is claimed to contain.

[fol. 232] 2. In 1955 the Silvers had commenced to sell certain shares of the U. S. Hoffman Machinery Corporation, some two months after acquiring them. When the shares were acquired the Silvers had stated in writing that they had "no present intention" of selling them.

3. In the application of Municipal, Inc. for approval of private wire connections and stock ticker service which required a listing of all of Silver's corporate connections for a ten year period, a long list of such connections which he submitted failed to mention two corporations with which he had been connected.

4. In 1953, some six years before the wire services were discontinued, the Department of Defense had suspended the security clearance of Intercontinental Manufacturing Co., Inc. of which Silver and his wife, who was secretary-treasurer of Municipal, Inc., had been officers, directors and substantial stockholders, and also the clearances of the Silvers individually. This action was taken under the now defunct Industrial Personnel Security Program. See Greene v. McElroy, 360 U. S. 474.

The Exchange denies that its conduct placed plaintiffs at any substantial competitive disadvantage or caused them any monetary loss.

There are two distinct aspects of the controversy presented on these motions, though the complaint combines both aspects in a single claim. Each aspect constitutes a separate and distinct claim for relief based on two separate and distinct alleged anti-trust violations.

These two aspects concern, first, the withdrawal of the private wire and telemeter connections, and second, the discontinuance of the stock ticket. Each will be considered as a separate claim for relief and separately treated on the merits.

[fol. 233] I.

THE PRIVATE WIRE AND TELEMETER CONNECTIONS.

A. *The claimed exemption from the anti-trust laws.*

The initial question presented for decision is whether or not, as the Exchange claims, it is exempt from the anti-trust laws by reason of the provisions of the Securities Exchange Act of 1934, and, if so, whether such exemption applies to the facts in the case at bar.

The Exchange does not claim that there is an express exemption in the statute itself, and there is none. It concedes that there is no implied over-all blanket exemption. It urges, however, that it is impliedly exempt from the anti-trust laws to the extent that it has been charged with duties and obligations by the Act. It argues that everything which the plaintiffs complain of here was done in pursuance of duties and obligations placed upon it by the Act, and that therefore it is not liable under the anti-trust laws for any of the acts complained of. In my view this position is not tenable.

Section 5 of the Securities Exchange Act, 15 U. S. C. §78(e), makes it unlawful to use the mails or any instrumentality of interstate commerce to effect or report any transaction in a security through the facilities of an exchange which has not registered with the Securities and Exchange Commission in compliance with Section 6 of the Act. Section 6 provides for the registration of a national securities exchange by the filing of a registration statement prescribed by the SEC and accompanied by: (1) an agreement to comply, and to enforce compliance by its members, with the provisions of the Act and the rules and regulations made thereunder; (2) data and information on organization, rules and procedure and membership; (3) "Copies of its Constitution * * * and of its existing bylaws or rules or instruments * * * ; and (4) An agreement to furnish to the [fol. 234] Commission copies of any amendments to the rules of the exchange forthwith upon their adoption." Subsection (b) of Section 6 provides:

"No registration shall be granted or remain in force unless the rules of the exchange include provision for

the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principle of trade."

In substance, the purpose of the Securities Exchange Act of 1934 as expressed in Section 2 of the statute was to protect the investing public as well as the national economy and the national financial system from the injurious effects of manipulative and dishonest practices in the purchase and sale of securities.

A principal concern of Congress was the practices on the national stock exchanges which had been subject to searching congressional investigation. The report of the Senate Committee which accompanied this legislation to the floor states the basis upon which Congress concluded that regulation of the Exchanges was necessary. S. Rep. No. 792, 73d Cong., 2d Sess. (1934). The report says (pp. 4-5):

> "Stock exchanges have hitherto resisted proposals for their regulation by any governmental agency, on the ground that they are sufficiently able to regulate themselves to afford protection to investors.
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> "The contention of stock exchange authorities that internal regulation obviates the need for governmental control seems unsound for several reasons. In the first place, however zealously exchange authorities may [fol. 235] supervise the business conduct of their members, the interests with which they are connected frequently conflict with the public interest. Secondly, the securities exchanges have broadened the scope of their activities to the point where they are no longer isolated institutions, but have become such an important element in the credit structure of the country that regulation, to be effective, must be integrated with the protection of our entire financial system and the national economy. Thirdly, the control exercised by

stock exchange authorities is admittedly limited to their own members, and they are unable to cope with those practices of nonmembers which they deplore but cannot prevent. Fourthly, the attitude of exchange authorities toward the nature and scope of the regulation required appears to be sharply at variance with the modern conception of the extent to which the public welfare must be guarded in financial matters. Their adherence to the view that manipulation, pool activities, and the creation of illusory 'price mirages' are proper and legitimate, except where certain technical violations of their rules are involved, is inconsistent with the type of regulation the public interest demands.

"The manipulation of the so-called 'repeal stocks' on the New York Stock Exchange during the summer of 1933 illustrates the ineffectiveness of self-regulation * * *. The inability of the stock exchange authorities even to discover the flagrant abuses unearthed by the committee indicates that a Federal regulatory body could deal with such practices more effectively than the exchanges themselves."

It is thus plain that Congress had no intention of entrusting the national exchanges, which themselves required regulation, with general regulatory control over all phases of the securities business. What the exchanges were required [fol. 236] to do was to provide machinery by which to ensure that the listed securities business which they conducted and the conduct of their membership was in accordance with law and not inconsistent with just and equitable principles of trade. Such duties and obligations as were placed upon national exchanges by the statute are limited in scope and are confined to this subject matter only.

Congress contemplated and provided for the regulation of the securities business by the Securities and Exchange Commission which was set up for that specific purpose and not by private parties.

Indeed, that is the whole scheme of the statute. The securities business is plainly not confined to the trading

of securities on the floor of a particular national stock exchange, or, indeed, of national stock exchanges generally. It includes the extensive over-the-counter securities market, the whole underwriting and new issue field, and the purchases and sales of listed and unlisted securities other than on the floor of an exchange or over-the-counter.

Such regulatory power as Congress has chosen to assert over this broad field has been vested in the Securities and Exchange Commission which is charged with the burden of such regulation.

It is true that there was relatively little in the 1934 Act relating to the over-the-counter market except in terms of generality. However, the 1938 amendment to the Securities Exchange Act, 15 U. S. C. §78o-3, gave the Commission broadly extended powers and functions in this area. The House Committee report to accompany this legislation indicates that the 1934 Act did not give exchanges any control over the over-the-counter securities business but limited them to their own area of the securities business. H. Rep. No. 2307, 75th Cong., 3d Sess. (1938). The report states (p. 5):

> "In the Securities Exchange Act of 1934 • • • the over-the-counter markets were dealt with, in brief out-[fol. 237] line, in a single section. The brevity and generality of this treatment arose from a realistic recognition of the great difficulties of working out in any detail a suitable plan of regulation at that time, in view of the fact that so little was then known concerning these markets. But, though the Congress did not at that time have before it a sufficient record of regulation, it clearly set forth the objectives of and the standards for such regulation. Section 15, in its original form, expressly contemplated the adoption by the Securities and Exchange Commission of rules and regulations concerning the over-the-counter markets 'necessary or appropriate in the public interest • • • to insure investors protection comparable to that provided by and under authority of this title in the case of national securities exchanges'. To that end, the Commission was authorized to adopt rules and

> regulations providing 'for the regulation of all transactions by brokers and dealers on any such market, for the registration with the Commission of dealer and/or brokers making or creating such a market, and for the registration of the securities for which they make or create a market.'"

The 1938 Act provides mechanisms of regulation of over-the-counter broker/dealers in that area of the securities business. It permits registration with the SEC of associations of broker/dealers. To obtain registration rules must be submitted to the SEC designed to prevent fraudulent and manipulative practices and promote just and equitable principles of trade. Such rules must also provide that "members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or any other fitting penalty, for any violation of its rules".

In contrast to the provisions regarding national exchanges, proceedings for review are available before the [fol. 238] SEC for members of broker/dealer associations who have been disciplined, or aggrieved persons who are refused membership. The orders of the SEC entered after such proceedings are subject to review by the courts under Section 25(a) of the Securities Exchange Act of 1934, 15 U. S. C. §78y. See, e. g., R. H. Johnson & Co. v. Securities and Exchange Commission, 2 Cir., 198 F. 2d 690, *cert. den.* 344 U. S. 855.

Moreover, in the 1938 amendment Congress expressly provided that in the event of conflict between any provision of the 1938 Act and any other provision of law, the provisions of the 1938 Act should prevail. (15 U. S. C. §78o-3(n).) This, of course, includes the anti-trust laws.

This again is in contrast to the provisions of the 1934 Act dealing with national stock exchanges where there is no such exemption. As Judge Medina stated with respect to the 1933 and 1934 Acts in United States v. Morgan, D. C. S. D. N. Y., 118 F. Supp. 621, 697:

> "Do the provisions of the Act of 1933 and the Act of 1934 (except the Maloney Act) amount to an implied exemption, in whole or in part, from the provi-

sions of the Sherman Act? In my opinion they do not. Where it was thought desirable and necessary to do so the Congress made specific provision for such exemption, as in Sec. 15A(n) of the Maloney Amendment to the 1934 Act, where it was thought that the Rules of Fair Practice of the NASD might run afoul of the Sherman Act.

"It must be borne in mind that this whole statutory scheme was worked out with the greatest care by members of the Congress thoroughly aware of anti-trust problems, often in close contact and cooperation with those who were later to administer the intricate phases of this well articulated and comprehensive plan of regulation of the securities business, and in possession of the fruits of many prolonged and penetrating investiga- [fol. 239] tions. They intended no exemption to the Sherman Act; and it is hardly probable that they would inadvertently accomplish such a result. * * *."

The Exchange argues that the scheme of the Act of 1934 was complete regulation and control of all matters relating to securities transactions and that as a registered Exchange it is therefore part of a regulated industry exempt from the anti-trust laws, at least as to all rules filed with the Commission. It is under several misconceptions.

In the first place "[r]egulated industries are not *per se* exempt from the Sherman Act * * *. [I]t is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy". Georgia v. Pennsylvania Railroad Co., 324 U. S. 439, 456-457. See, also, United States v. Borden Co., 308 U. S. 188; Slick Airways v. American Airlines, D. C. D. N. J., 107 F. Supp. 199; *cert. den.* 346 U. S. 806; Report of the Attorney General's National Committee to Study the Antitrust Laws, 261-262 (1955).

As I have pointed out, there is no repugnancy between the provisions of the Act of 1934 and the anti-trust laws in so far as any rules, required to be filed by a national exchange, attempt to intrude upon the over-the-counter securities market. There is not the slightest indication of

congressional intent to grant any exemption from the anti-trust laws with respect to the acts with which we are concerned here.

Beyond this, it is plain that this is not a closed regulatory system which is a substitute for or supersedes the anti-trust laws. The SEC does not give affirmative sanction to the rules filed by national exchanges. Its grant of registration to an exchange goes no farther than to indicate that the rules filed meet the minimum standards required of ex- [fol. 240] changes by the statute so as to insure that its members will comply with the provisions of the law and shall not conduct themselves in a manner inconsistent with just and equitable principles of trade.

Moreover, and equally important, there is no procedure by which a non-member aggrieved by action of the Exchange purportedly taken under its filed rules, may resort to administrative proceedings before the SEC to redress his grievances or to attack the rules themselves, either at the time of filing or thereafter.

The position in which plaintiffs here find themselves illustrates this. If the theory of the Exchange were correct these plaintiffs would not only have no remedy before the Commission but would find themselves barred from remedy in the courts also on the mere say-so of a private association. This is in marked contrast to what occurs in a recognized closed regulatory system. See, e.g., Shipping Act, 46 U. S. C. §801, et seq.; Interstate Commerce Act, Part I, 49 U. S. C. §1, et seq.; Natural Gas Act, 15 U. S. C. §717, et seq.

Plainly the provisions of the Act requiring an exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the anti-trust laws.

The Exchange also urges that since orders and information on listed securities may be transmitted over the private wire connections with its members, it is entitled for the protection of its own business to direct that such connections with plaintiffs be severed in its sole discretion.[6] As-

[6] It may be noted that the definition of an Exchange "facility" in subsection 3a(2) of the 1934 Act, 15 U. S. C. §78c(a)(2), does not include private wire connections between members and non-

suming for purposes of argument, and without deciding [fol. 241] the doubtful proposition that actions of the Exchange in prohibiting its members from using private wire connections with an individual non-member to communicate with respect to its listed securities were exempt from the anti-trust laws, there is no warrant for such an exemption with respect to transactions or information in over-the-counter securities. The Exchange may not extend whatever power it may possess over its own limited market in the securities which it lists to an entirely different phase of the securities business without being answerable for any restraints of trade which it might thus impose. There is nothing in the statute to warrant a different result.

The question we are dealing with here is not whether the acts of the Exchange were in conformity with its rules but whether or not its acts violated the anti-trust laws. It is not necessary to determine here whether some exemption from the anti-trust laws may or may not be impliedly granted to the Exchange by the provisions of the Act of 1934 if its acts directly concern the business in listed securities carried on on the floor of the Exchange. But the question here concerns an entirely different phase of the securities business, the over-the-counter and unlisted municipal markets. The Exchange is not remotely authorized or empowered by the statute to exercise any powers beyond the scope of its own business in listed securities and the ethical conduct of its own membership. It is not entitled to regulate or control conduct of its members which does not concern the listed securities business which the Exchange carries on in pursuance of the only purpose for which it was established.

Providing that its members do not indulge in conduct which is illegal or inconsistent with just and equitable

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members. A "facility" is defined as including an exchange's "* * * premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or *any service thereof for the purpose of effecting or reporting a transaction on an exchange* (including, among other things, any system of communication *to or from the exchange*, by ticker or otherwise, maintained by or with the consent of the exchange) * * *." (Emphasis added.)

principles of trade, an exchange has neither the power nor the authority to determine with whom its members may or may not deal or to direct them to desist from dealing with non-member broker/dealers engaged in transactions in [fol. 242] over-the-counter securities and municipals. If it does so it does so at its peril and is subject to such appropriate action as may be taken under the anti-trust laws.

B. The Claimed Anti-Trust Violations.

Since the acts of the Exchange which are the subject of this action are not exempt from the anti-trust laws, the next question is whether its acts violated these laws.

It is by now well settled that a concerted refusal to deal—that is to say, joint action by two or more persons in refusing to deal with another—violates Section 1 of the Sherman Act and is illegal per se. Radiant Burners v. Peoples Gas Light & Coke Co., 364 U. S. 656; Klor's v. Broadway-Hale Stores, 359 U. S. 207; Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457. See, also, Northern Pacific Railway Co. v. United States, 356 U. S. 15; Kiefer-Stewart Co. v. Seagram & Sons, 340 U. S. 211, 214; United States v. Columbia Steel Co., 334 U. S. 495, 522.

The Exchange asserts that the acts of itself and its members in the severance of the private wire connections with the plaintiffs are not a concerted refusal to deal as that term is used in the cases.

The Exchange does not dispute that the severance of connections was the result of joint action between itself and its members. It concedes that the discontinuance by member firms of private wire connections with the plaintiffs was done in accordance with defendant's instructions and was not the independent act of each member.

Upon being admitted to membership in the Exchange, each member binds itself to comply with the directives issued by the Exchange pursuant to its constitution and rules. Failure to act in conformity with such instructions subjects a member to disciplinary action and possible expulsion under Section 6, Article XIV of the constitution. Each of the member firms "by entering into this com-

[fol. 243] bination" has "surrendered himself completely to the control of the [Exchange]" with respect to the means by which he may do business or communicate with non-members. Anderson v. Shipowners Association, 272 U. S. 359, 362. As was said in that case (pp. 364-5):

> "* * * it appears that each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and agreed to abide by the will of the associations. * * *. These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows * * * that the combination is in violation of the Anti-Trust Act."

The effect of this combination was to bar the member firms named as co-conspirators from exercising their freedom to carry on trade and commerce with these plaintiffs according to their own choice and discretion. They have placed restraints upon their own liberty of action and have foreclosed themselves from exercising their own independent business judgment with respect to their dealings with these plaintiffs. They are limited in such dealings by the dictates of the combination which has substituted its business will and judgment for their own. This is one of the evils at which the Sherman Act is directed. Klor's v. Broadway-Hale Stores, *supra;* United States v. First National Pictures, 282 U. S. 44; Anderson v. Shipowners Association, *supra.*

Moreover, the group action which was taken resulted in the denial to these plaintiffs of the opportunity to do business with the members of the Exchange upon the same terms and conditions as others in the over-the-counter and municipal securities markets in which they were engaged. As far as the Exchange, its members and the plaintiffs [fol. 244] are concerned there was no longer a free and untrammeled market.

Once it is shown that there was group action which produced these effects it is unnecessary to go farther. Such

a concerted refusal to deal is in the forbidden category. It is per se violation of Section 1 of the Sherman Act which is designed "to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restrain of trade". Ramsey Co. v. Associated Bill Posters, 260 U. S. 501, 512. In its very nature and character the action of the group interferes with the normal and natural flow of interstate commerce and the interplay of free competition therein. Section 1 of the Sherman Act forbids all combinations of such a nature.

It is not necessary to show that the combination prohibited all dealings between the member firms involved and the plaintiffs, as the Exchange seems to contend. The effect of the Exchange directive to the members of the combination was to foreclose them from dealing with the plaintiffs by means of the private wire connections which were a normal means of doing business in over-the-counter and unlisted municipal securities. The combination operated to deprive plaintiffs of a means of doing business which was of substantial value to them in the conduct of their business. The very nature of the business in which plaintiffs were engaged makes this abundantly plain. This means of doing business was available to others who did not fall within the proscription directed against plaintiffs. There were numerous other non-member broker/dealers in Dallas, and in other parts of the country, who maintained such private wire connections with member firms and continued to use them.[7]

[fol. 245] "[T]he fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman

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[7] This is made abundantly clear by a letter of February 16, 1959 from Schneider, Bernet & Hickman, Inc., a member corporation, to the Exchange seeking clarification of the Exchange's order of discontinuance of the private wire connection with Municipal, Inc.:

"A direct private wire to the Municipal Securities Company, Inc. * * * is operating at the present time, *as is a private wire to most of the other members of the N. A. S. D. in Dallas.*" (Emphasis added.)

Act." Associated Press v. United States, 326 U. S. 1, 17. An offer to deal only under discriminatory terms or conditions is just as violative of the Sherman Act and its purposes as a refusal to deal altogether. Associated Press v. United States, *supra;* Klor's v. Broadway-Hale Stores, *supra;* United States v. First National Pictures, *supra.*

The Exchange urges its action cannot violate the Sherman Act since there are other means of communication with its member firms which are available to the plaintiffs. But the Exchange does not deny that the private wire connections are the fastest and most direct means of communication between traders in a business which involves rapidly fluctuating prices and where up to the minute information is of the essence. It may be that these communications are not indispensable to the conduct of the plaintiffs' business and that they could somehow get along with substitute means of communication. But the indispensability test has long been rejected as a standard of Sherman Act violation. As the court said in the *Associated Press* case, *supra*, at p. 18:

> "The proposed 'indispensability' test would fly in the face of the language of the Sherman Act * * *. Moreover, it would make that law a dead letter in all fields of business, a law which Congress has consistently maintained to be an essential safeguard to the kind of private competitive business economy this country has sought to maintain."

The conduct of the Exchange and its members cannot be saved by the claim that they were acting reasonably under the specific circumstances. Nor is it necessary to show that the boycott fixed or regulated prices or injured the over-the-counter and municipal securities markets gen- [fol. 246] erally. A concerted refusal to deal is deemed to inflict public injury of that kind by its very nature. Klor's v. Broadway-Hale Stores, *supra;* Fashion Originators' Guild v. Federal Trade Commission, *supra.*

It matters not whether the methods pursued by the combination to attain its objectives are claimed to be reasonable or justifiable under the circumstances or are for bene-

ficial purposes. The combination cannot escape the proscriptions placed by the law upon its conduct by any showing of reasonableness or justification. The combination is *per se* illegal and the prohibition against it is absolute however extenuating the conditions may be which gave rise to it. As stated in Fashion Originators' Guild v. Federal Trade Commission, *supra*, at p. 468:

> "[T]he reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination."

See, also, Anderson v. Shipowners Association, *supra;* Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U. S. 37, 47; Paramount Famous Lasky Corp. v. United States, 282 U. S. 30, 43; Report of the Attorney General's National Committee to Study the Antitrust Laws 133 (1955); Handler, Recent Developments In Antitrust Law: 1958-1959, 59 Col. L. Rev. 843, 862 (1959); Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 875 (1955); 41 Col. L. Rev. 941 (1941).

The policy of the statute is to leave to each trader individually the determination as to whether to deal with any particular person and to forbid such a determination by group action regardless of the reasons therefor. As the court said in Fashion Originators' Guild v. Federal Trade Commission, *supra* (p. 468):

> "[I]t was not error to refuse to hear the evidence offered * * *. [T]he unlawful combination [cannot] [fol. 247] be justified upon the argument that systematic copying of dress designs is itself tortious, or should now be declared so by us. * * *. [E]ven if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law."

Thus, the contention of the Exchange that this is a case in which a rule of reason must be applied under which its

conduct could be justified, is without merit. There is no room here for the application of any rule of reason for which the Exchange contends, since the facts establish a concerted refusal to deal which is intrinsically unreasonable in the light of the purpose and intent of the statute.

It may be noted, however, that even if the position of the Exchange that this is a case for the application of a rule of reason were correct the Exchange would not be exonerated here. The test which the Exchange seeks to apply is merely whether there was justification for its conduct with respect to these particular plaintiffs. It claims that its actions were based upon information showing that Silver, the sole proprietor of Municipal, and the president and sole stockholder of Municipal, Inc., and Mrs. Silver, its secretary-treasurer, were untrustworthy persons of bad repute and doubtful character and that its action in directing its member firms to discontinue the wire connections with the plaintiffs was therefore justified.

The record fails to substantiate these charges against the Silvers.

The Exchange asserts that it obtained such information as a result of investigations conducted in connection with applications of Municipal, Inc. for approval of private wire connections and for stock ticker service. The information obtained is in four different categories:

1. Certain material claimed to be of a confidential nature is said to disclose "scurrilous" information concerning [fol. 248] Mr. and Mrs. Silver. Such material is not in this record. All that is before the court is the bare assertion that the information is "scurrilous", without a single fact to support such very serious accusations. Not only have the plaintiffs had no opportunity to rebut such undisclosed material, neither they nor the court know what it consists of.

The Exchange has taken the position that it will not make this material available to the plaintiffs unless the Silvers are willing to execute releases from any liability for defamation to the Exchange, its investigators and its so-called confidential sources, or unless the court directs its submission. Its offer to submit the material to the

court in camera without disclosing it to the plaintiffs was refused. As I have previously indicated, the Exchange was given ample opportunity to place the material in the record if it so desired so that the plaintiffs might have an opportunity to answer it. The Exchange failed to do so. (See *supra*, p. 139).

All that the court can assume in view of the position taken by the Exchange is that the material consists of dubious gossip emanating from unreliable sources and is totally unworthy of credence.

In so far as this portion of the material on which the Exchange relies to justify its conduct is concerned, the position which it has taken, far from demonstrating that it had a reasonable basis for its action, indicates the contrary.

2. The Exchange claims that the Silvers disposed of certain shares of U. S. Hoffman Machinery Corporation stock in 1955 after they had executed an agreement when they acquired the stock that it was their present intention to hold it for investment purposes and not to dispose of it. There is no merit to the claim that these facts indicate that the Silvers were untrustworthy. The SEC was fully apprised of these transactions and acquiesced in the sale [fol. 249] without the need for a registration certificate. The material that was submitted to the SEC in justification of the sale, which is uncontroverted by the Exchange, demonstrates that the Silvers did not act in bad faith either in the statements made at the time of acquisition or in making the sales. No doubt the Exchange could readily have obtained such information from the SEC at the time of its investigation which would have refuted the charge. In any event, it could easily have been refuted by the Silvers had they been given an opportunity to do so.

3. The Exchange states that in the applications of Municipal, Inc. for approval of private wire connections and stock ticker service it failed to list all of Silver's corporate connections for a ten year period by omitting connections with The Joggler Corporation and Trans-Mar, Inc. It makes no showing that these omissions were intentional or material and Silver categorically denies that they were.

There is nothing to show that there was anything wrong with these corporations or anything remotely improper in Silver's connection with them. For all that appears here, had these omissions been called to Silver's attention he could have given the Exchange any information which it desired on the subject.

4. Finally, the Exchange relies on the fact that the security clearance of the Silvers and of Intercontinental Manufacturing Co., with which they were connected, had been suspended by the Department of Defense in 1953 under the Industrial Personnel Security Program.

In Greene v. McElroy, *supra*, decided in June 1959, the Supreme Court determined that the Industrial Personnel Security Program was unlawful and void. It held that since the Program afforded neither the safeguards of confrontation nor of cross examination to those against whom proceedings were instituted it was wholly unauthorized in the absence of explicit authorization from either the President [fol. 250] or Congress. It did not reach the constitutional question as to whether the procedures violated due process.

On August 23, 1960 the actions of the Central Industrial Personnel Security Board revoking the security clearances of the Silvers, were vacated and expunged from the records by the Department of Defense in accordance with Greene v. McElroy.

At the time the Exchange took action against the plaintiffs in February of 1959 it had before it only the bare fact that security clearances of the Silvers had been suspended. Its efforts to obtain further information from the Department of Defense were met with the reply that all the material was confidential.

Thus, in so far as appears by this record, the Exchange chose to rely upon the naked fact that the security clearances had been suspended without any information as to the nature of the charges which had been made against the Silvers more than five years before, or the grounds upon which the Department of Defense had acted.

When the Exchange acted the Industrial Personnel Security Program had already come under attack in the courts and Greene v. McElroy was decided less than four

months later. In the meantime the Exchange had denied to the plaintiffs the very right to specification of charges against them and confrontation which had been denied by the Industrial Personnel Security Board. Neither then nor thereafter when Greene v. McElroy had been decided, did the Exchange make any effort to inform the plaintiffs that the denial of security clearances was a part of the basis for its action or to give them any opportunity to make an explanation. Instead, the Exchange has consistently taken the position that the denial of security clearances was sufficient justification for its action, despite the fact that the Program has been held to be unlawful and void and the action on which the Exchange relied has been vacated and expunged from the official record.

[fol. 251] The Exchange has placed in the record letters obtained, during pre-trial proceedings in this case, from the files of the Silvers, received by them from the Industrial Personnel Security Board at the time their clearances were suspended. These letters indicate that one of the reasons for denying security clearance was that the Board considered that the Silvers were not reliable and trustworthy. The action of the screening division was affirmed by the appeal division and by the Secretary of Defense. As the Supreme Court pointed out in Greene v. McElroy, such conclusions were reached without the right of confrontation or cross-examination and were entirely unauthorized. The defense authorities themselves have voided their own action and the procedures are no longer used.

It appears that the Exchange claims the right to adopt the same procedures with respect to the Silvers as were found to be unauthorized by the Supreme Court in the case of the Defense Department where vital national security interests were at stake. In my view the conduct of the Exchange cannot be justified by the denial of security clearance under the circumstances here disclosed, nor by any of the other facts and circumstances upon which it relied.

It may be noted that, upon deposition, Walter Coleman of the defendant's department of member firms, expressly stated that the action of the Exchange was not based on any criminal convictions of either of the Silvers, on any

false or misleading statements made by them to the SEC in any application for the registration of securities, or on any specific matters regarding securities transactions other than the alleged transactions in U. S. Hoffman stock.

The inescapable conclusion from what is relied on by the Exchange in justification is that it acted arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed.

[fol. 252]

C. The Right of Plaintiffs to Partial Summary Judgment.

Since I have held the conduct of the Exchange is in violation of Section 1 of the Sherman Act, the only remaining question is whether the plaintiffs are persons who are injured in their business or property by reason of such conduct under Section 4 of the Clayton Act. This the plaintiffs have clearly established.

The withdrawal of private wire and telemeter connections between the plaintiffs and the eleven member firms of the New York Stock Exchange with whom they were maintained could not fail to injure the plaintiffs' business. Such connections were available to most of the other broker/dealers who were members of the National Association of Security Dealers in Dallas.[8] The Exchange concedes that these connections were a more rapid means of communication with its members than any other. This is quite apart from the fact that the connections were installed and maintained at no cost to Municipal, Inc., and at nominal cost to Municipal. Plaintiffs have shown actual out-of-pocket expenses for substitute facilities.

Thus, under Section 4 the plaintiffs, as persons injured in their business by reason of a violation of the Sherman Act, are entitled to judgment that the Exchange is liable to them for threefold the damages by them sustained and the cost of suit, including reasonable attorney's fee.

The question of the amount of damages and costs to which plaintiffs may be entitled raises questions of fact which cannot be determined on this motion and must be left to a trial.

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[8] See Note 7, *supra*, at p. 152.

It is plain that the conduct of the Exchange has continued and will continue and will cause loss and damage to these plaintiffs in the future unless enjoined by this court. Plaintiffs are therefore entitled to a decree under Section 16 of the Clayton Act permanently enjoining the [fol. 253] defendant from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire and telemeter connections between its member firms and the plaintiffs.

II.

THE STOCK TICKER SERVICE

The claim of Municipal, Inc. that the action of the Exchange in withdrawing temporary approval of its application for the stock ticker service and discontinuing such service to it was in violation of the anti-trust laws is on a somewhat different footing from the claims with relation to the private wire connections.

The stock ticker service is supplied by the Exchange directly to those receiving it, transmitted through Western Union. Applications for the service are made directly to the Exchange and approved or disapproved by its Board of Governors. The primary attack which Municipal, Inc. makes on the action of the Exchange with respect to the stock ticker service involves alleged violation of Section 2 of the Sherman Act rather than Section 1. Municipal, Inc. asserts that the Exchange has a monopoly over the current quotations of the listed stocks traded in on its floor and over their dissemination. The denial by the Exchange of the stock ticker service to Municipal, Inc. is claimed to be a misuse of this monopoly power for the purpose of obtaining a competitive advantage for its members in the entirely different over-the-counter securities market to the competitive disadvantage of Municipal, Inc. See United States v. Griffith, 334 U. S. 100. See, also, International Salt Co. v. United States, 332 U. S. 392.

Municipal, Inc. recognizes that in order to succeed on this theory it must establish that members of the Exchange obtained a competitive advantage from the action of the Exchange and that Municipal, Inc. has sustained a competi-

[fol. 254] tive disadvantage. It admits that there are questions of fact on this issue which are not resolved in the papers before me on this motion and which require a trial. It therefore is not entitled to partial summary judgment on this theory.

As a second string to its bow, however, Municipal, Inc, urges that the withdrawal of ticker service, like the severance of private wire connections, is the result of a concerted refusal to deal by the Exchange and its members and therefore is a per se violation of Section 1 of the Sherman Act which entitles it to partial summary judgment similar to that granted with respect to the private wire connections.

The Exchange, on the other hand, contends that the individual members and member firms of the Exchange have nothing to do with the grant or refusal of the ticker service to non-members, which is a property right of the Exchange itself. It points out that the stock ticker service goes directly from the Exchange to those subscribing to it, and that the individual members or member firms have nothing to do with the service. Members are not called upon to take any action on applications for the service. Nor have they any voice either in inaugurating the service or terminating it. They are not even notified by the Exchange when applications are filed or when they are granted.

Thus, says the Exchange, the withdrawal of the stock ticker service cannot be the result of concerted action but is the action of the Exchange alone, acting as an individual trader and not in concert with others.

The Exchange does not claim the right to apply its rules in an arbitrary or discriminatory manner. But it claims that it is entitled to take such action as it deems appropriate as an individual trader protecting its own property rights and that the group action which is required to establish a *per se* violation of Section 1 of the Sherman Act on the ground of concerted refusal to deal is wholly lacking here. *Cf.* United States v. Parke, Davis & Co., 362 U. S. [fol. 255] 29; United States v. Bausch & Lomb Optical Co., 321 U. S. 707; Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441; Frey & Son v. Cudahy Packing

Co., 256 U. S. 208; United States v. Colgate & Co., 250 U. S. 300.

The Exchange is a New York unincorporated association. Municipal, Inc. takes the position that the Exchange therefore can take no action as an individual trader and that any action which it takes is necessarily, by reason of the nature and character of its organization the collective action of all of its members. Municipal, Inc. argues that the withdrawal of the stock ticker service by the Exchange must have been the result of collective action since the Exchange could act in no other way. It urges, therefore, that the action of the Exchange must be a concerted refusal to deal which is a *per se* violation of Section 1 of the Sherman Act for the same reasons as applied to the actions of the Exchange and its members with respect to the private wire connections.

The Exchange has a property interest in its own quotations and is entitled to take reasonable measures to protect that interest. See Moore v. New York Cotton Exchange, 270 U. S. 593; Hunt v. New York Cotton Exchange, 205 U. S. 322; Board of Trade v. Christie Grain and Stock Co., 198 U. S. 236. To this extent it may have some limited exemption from the anti-trust laws with respect to the ticker service which disseminates such quotations. I do not pass on that question here.

In my view, whether or not under the circumstances here the proprietary interest of the Exchange in the stock ticker service and the action which was taken concerning that interest was that of a single trader protecting its own property rights and thus not forbidden by Section 1 of the Sherman Act, or is the concerted refusal to deal prohibited by Section 1, should not be finally determined on the record now before me. This is a question on which no definitive authority has been called to my attention and I have found [fol. 256] none. *Cf.* Sperry Products v. Association of American Railroads, 2 Cir., 132 F. 2d 408, *cert. den.* 319 U. S. 744; Chamber of Commerce v. Federal Trade Commission, 8 Cir., 13 F. 2d 673; Martin v. Curran, 303 N. Y. 276; Kirkman v. Westchester Newspapers, 287 N. Y. 373; Gillette v. Allen, 269 App. Div. 441. On this phase of the case it appears to me that application of the summary

judgment rule is questionable and I consider it sound judicial administration to permit a trial so as to present a more solid basis for definitive findings and conclusions. Among other things, there should be a full exploration of the facts as to the nature, character and composition of the Exchange, its organizaiton and the manner in which the Exchange takes action and took action on matters such as this. This is in addition to the issues with respect to competitive advantage or disadvantage arising under the plaintiffs' first theory on this phase of the case. See United States v. Bethlehem Steel Corp., D. C. S. D. N. Y., 157 F. Supp. 877, 879; Kennedy v. Silas Mason Co., 334 U. S. 249, 256-257; 6 Moore Federal Practice 2169 (2d ed. 1953). Moreover, there must be a trial in any event on the issue of damages.

The motion of Municipal, Inc. for partial summary judgment with respect to its claim based on withdrawal of the stock ticker service will therefore be denied.

One further point remains.

In the brief memorandum of decision which I heretofore filed on these motions on May 19, 1961 I stated that while Municipal, Inc. was not entitled to partial summary judgment it had esfablished its right to a preliminary injunction under Section 16 of the Clayton Act and Rule 65, F. R. C. P., restraining defendant pending the final determination of this action from refusing to make the stock ticker service available to it. In again reviewing the papers submitted by the plaintiffs in support of their motions during the preparation of this opinion I find that I overlooked the following statement at the end of their reply affidavit:

> [fol. 257] "It should be noted that plaintiff MSC, INC. does not seek preliminary injunctive relief, but only partial summary judgment on the issue of liability and summary judgment for permanent injunctive relief.
>
> "As I stated in my moving affidavit, MSC, INC. has ceased to function as an operating business organization. It has no employees and retains only its corporate existence, its Texas license as a securities dealer, its broker-dealer registration with the Securi-

ties and Exchange Commission, its membership in the National Association of Securities Dealers, and certain unliquidated assets. If MSC, INC. were to be granted a preliminary, rather than a permanent injunction, I would not and could not attempt to re-establish it as a functioning organization. First of all, employees would be unwilling to return to work on a temporary basis accorded by a preliminary decree. Secondly, as a practical matter, I could not undertake the substantial financial investment which is required to restore MSC, INC. as an operating organization under such circumstances."

Regardless of the merits, Municipal, Inc., by making the statement which I have quoted, has waived any rights which it might have had to a preliminary injunction and is not entitled to such relief. For this reason I withdraw that portion of my memorandum decision which stated that Municipal, Inc., was entitled to preliminary injunctive relief and such relief will be denied.

It may be noted that pursuant to 28 U. S. C. §1292(a) the defendant may take an appeal to the Court of Appeals from that portion of the order to be entered which grants a permanent injunction against it with respect to the private wire connections. In my view the other issues determined by the order to be entered involve controlling questions of law as to which there is substantial ground [fol. 258] for difference of opinion, and an immediate appeal on such issues also may materially advance the ultimate determination of the litigation. The order to be entered may so state pursuant to Section 1292(b).

Settle order in accordance with this opinion on seven (7) days' notice.

Dated: New York, N. Y., June 16, 1961.

Frederick vP. Bryan, U. S. D. J.

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ORDER OF DISTRICT COURT—August 2, 1961

The cause having been heard on the motion of plaintiff Harold J. Silver, d/b/a Municipal Securities Company, and plaintiff Municipal Securities Company, Inc. for summary judgment pursuant to Rule 56(a) and (c) of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law on the first cause of action set forth in their complaint, except with respect to the amount of the damages, and for other appropriate relief, and upon the motion of plaintiff Harold J. Silver, d/b/a Municipal Securities Company, for preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, and upon due and careful consideration of all of the papers, documents and materials heretofore submitted to the Court, and after having heard oral argu- [fol. 259] ments thereon, and the Court having filed its memorandum decision dated May 19, 1961 and its written opinion dated June 16, 1961, containing the Court's findings of fact and conclusions of law and defendant's motion for reargument of plaintiffs' motions having been denied by memorandum opinion dated July 14, 1961, it is Ordered:

(a) That the motion of plaintiff Harold J. Silver, d/b/a Municipal Securities Company, for preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, be and the same is hereby denied;

(b) That with respect to the action of the defendant in ordering the discontinuance of stock ticker service to plaintiff Municipal Securities Company, Inc., plaintiff Municipal Securities Company, Inc.'s motion for summary judgment under Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§15 and 16, be and the same is hereby denied;

(c) That with respect to the action of the defendant in ordering the withdrawal of plaintiffs' private wire and tele-

meter connections, plaintiffs' motion for summary judgment as to the liability of the defendant under Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. §15, except as to the amount of the damages and costs to which plaintiffs may be entitled, be and the same is hereby granted;

(d) That with respect to the action of the defendant in ordering the withdrawal of plaintiffs' private wire and telemeter connections, plaintiffs' motion for summary judgment for permanent injunctive relief under Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. §26, be and the same is hereby granted;

(e) That defendant be and hereby is permanently enjoined from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire and telemeter connections between plaintiffs and defendant's member firms and member corporations for the [fol. 260] purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange;

(f) That within ten days from the date of the entry of this order the defendant inform, in writing, Dallas, Rupe & Son, Inc.; Sanders & Co.; Goodbody & Co.; Merrill Lynch, Pierce, Fenner & Smith, Incorporated; Harris, Upham & Co.; Dallas Union Securities Co., Inc.; Schneider, Bernet & Hickman, Inc.; Rauscher, Pierce & Co. Inc.; Eppler, Guerin & Turner, Inc.; E. F. Hutton & Co.; and Straus, Blosser & McDowell, that defendant has no objections to the operation and maintenance of private wire or telemeter connections between plaintiffs and said member firms or member corporations for the purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange;

(g) That all further proceedings in this Court shall be stayed pending disposition of appeal from this order or any part thereof by the United States Court of Appeals for the Second Circuit.

In accordance with 28 USC §1292 (b) the Court is of the opinion that the issue as to the liability of defendant as determined by subparagraph (b) and (c) above involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal therefrom may materially advance the ultimate termination of the litigation.

Dated: New York, N. Y., August 2nd, 1961.

Frederick vP. Bryan, U. S. D. J.

[fols. 261-263]

In United States District Court

For the Southern District of New York

Notice of Appeal—August 31, 1961

Sirs:

Notice is hereby given that defendant New York Stock Exchange hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the order of Honorable Frederick vP. Bryan, entered in the office of the Clerk of the United States District Court for the Southern District of New York on August 3, 1961, designated therein as paragraphs (d) and (e), granting plaintiffs' motion for summary judgment for permanent injunctive relief under Section 16 of the Clayton Act, 15 U. S. C. §26, and permanently enjoining defendant from, among other things, interfering with the maintenance of private wire connections between plaintiffs' and defendant's member firms.

Dated: New York, N. Y., August 31, 1961.

Yours, etc.,

Milbank, Tweed, Hope & Hadley, 1 Chase Manhattan Plaza, New York 5, N. Y., Attorneys for Defendant.

To: Messrs. Dickstein, Shapiro & Galligan, 20 East 46th Street, New York 17, N. Y., Attorneys for Plaintiffs.

[fol. 264]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY, and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs,

—against—

NEW YORK STOCK EXCHANGE, Defendant.

NOTICE OF MOTION—August 9, 1961

Sirs:

Please Take Notice that upon the annexed affidavit of Edward J. Reilly, Jr., sworn to August 4, 1961, and the exhibits annexed thereto, the undersigned will move this Court on August 16, 1961, for an order, pursuant to 28 U.S.C. §1292(b) and Rule 10(d) of the Rules of this Court, permitting defendant to appeal from that part of the order of Honorable Frederick vP. Bryan, filed in the office of the Clerk of the United States District Court for the Southern District of New York on August 3, 1961, granting plaintiffs' motion as to the liability of defendant under Section 4 of the Clayton Act, 15 U.S.C. §15, and for such other and further relief as may be just and proper.

Dated: New York, N. Y., August 9, 1961.

Yours, etc.,

Milbank, Tweed, Hope & Hadley, 1 Chase Manhattan Plaza, New York 5, N. Y., Attorneys for Defendant.

To: Messrs. Dickstein, Shapiro & Galligan, 20 East 46th Street, New York 17, N. Y., Attorneys for Plaintiffs.

[fol. 265]

In United States Court of Appeals

For the Second Circuit

[Title omitted]

Affidavit of Edward J. Reilly, Jr.

State of New York,
County of New York, ss.:

Edward J. Reilly, Jr., being duly sworn, says:

I am an attorney associated with the firm of Milbank, Tweed, Hope & Hadley, attorneys for defendant, and am fully familiar with the pleadings and proceedings heretofore had herein. I make this affidavit in support of defendant's application for an interlocutory appeal under 28 U.S.C. §1292(b).

The Nature of the Action

The action was commenced on April 3, 1959, in the United States District Court for the Southern District of New York.

Plaintiff Harold J. Silver, doing business as Municipal Securities Company (herein "Municipal"), was engaged primarily in the business of buying, selling and underwriting municipal bonds. Plaintiff Municipal Securities Company, Inc. (herein "Municipal, Inc.") was engaged primarily in transactions in over-the-counter securities.

[fol. 266] Defendant New York Stock Exchange (herein "the Exchange") is a New York unincorporated association registered as a national securities exchange under the Securities Exchange Act of 1934.

The complaint alleges three causes of action. The first charges that the Exchange conspired with certain of its member firms to withdraw private wire connections between such member firms and plaintiffs and to withdraw the Exchange's continuous stock ticker quotation service from Municipal, Inc., and that such withdrawals were

violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. The second charges that the Exchange wrongfully induced the member firms to breach contracts for wire connections with plaintiffs. The third charges that the action of the Exchange constituted an intentional wrong without reasonable cause.

The Facts

In September, 1956, without the knowledge or approval of the Exchange, Municipal had installed private wire connections between its office and two member firms in Dallas, Texas. Thereafter, in June, 1958, Municipal, Inc. submitted an application to the Exchange for approval of private wire connections with a number of member firms. The application was in the form of an agreement in which Municipal, Inc. stated it desired the private wire connections "by means of which we [Municipal, Inc.] may obtain continuous quotation of the New York Stock Exchange." The obvious purport of the agreement is that it relates to the obtaining of the Exchange's quotations and to nothing else. For example, paragraph 3 states that Municipal, Inc. would not use the quotations of the Exchange for any illegal [fol. 267] purpose. In paragraph 4 Municipal, Inc. agreed that the quotations of the Exchange were for its individual use and would not be furnished to any other person and it further agreed that if such quotations were furnished to anyone without the Exchange's approval the Exchange might sue such person to prevent the receipt or use of such quotations. Other provisions—all relating solely to the use of the Exchange's quotations—are set forth in paragraphs 5 through 9. The agreement also authorized the discontinuance of the private wire connections whenever the Exchange withdraws its approval.

Municipal, Inc. furnished the Exchange with information concerning it and its officers and on receipt thereof the Exchange gave temporary approval of the requested private wire connections. A few days later Municipal, Inc. applied for stock ticker service and the Exchange gave temporary approval pending further processing.

After receipt of Municipal, Inc.'s applications for the private wire connections and stock ticker service, the Exchange, following its usual practice, had an investigation made of Municipal, Inc. and its officers by independent investigating agencies. The investigation disclosed, among other things, that in 1953 the Defense Department had suspended the security clearance of Intercontinental Manufacturing Company, Inc., a corporation of which Mr. and Mrs. Silver had been officers, directors and substantial stockholders, that the security clearance of the Silvers had been suspended, and that their efforts to have the suspension removed were unsuccessful. It also disclosed that the Silvers had violated a written agreement with U. S. Hoffman Machinery Corporation made at the time of the exchange of shares of stock of that corporation for shares [fol. 268] of stock of Intercontinental. One of the charges made by the Defense Department was that the Silvers' "behavior, activities and associations tend to show that * * * [they] are not reliable and trustworthy." The investigation also brought forth further disclosures with respect to the Silvers of a derogatory nature.

The Exchange concluded that on the basis of all the information obtained concerning the Silvers that the temporary approval of the private wire connections and stock ticker service should be withdrawn. It thereupon withdrew the stock ticker service and instructed its member firms having temporarily approved private wire connections with Municipal, Inc. to discontinue such wire connections, which they did shortly thereafter.

The Exchange did not know and had no way of knowing that Municipal, Inc. wanted the private wires with member firms for any other purpose than that specified, to wit, for obtaining quotations of listed securities. While we are aware that private wires may be used to effect transactions in unlisted securities, more than half of the 5,600 non-member securities dealers in North America and at least 33 of the 56 non-member firms in Dallas do not have private wire connections with member firms. Apparently they transact their business in unlisted securities either through private wires with other non-member firms or

in some other way. Municipal admittedly had more private wires with non-members than with member firms and Municipal, Inc. represented in its application to the Exchange that it wished to obtain quotations of listed securities. [fol. 269] In opposing plaintiffs' motion for summary judgment, Mr. Frank J. Coyle, a vice president of the Exchange, stated, as he then believed to be the fact, that "the member firms having unapproved private wire connections with Municipal were requested to discontinue them." In its motion for reargument, which was denied, the Exchange pointed out that that statement was in error, that the only letters of discontinuance sent by the Exchange were limited solely to Municipal, Inc., that the employees of the Exchange had no recollection of any communications with respect to Municipal's private wires, and that the Exchange did not even know of the existence of Municipal—to say nothing of its private wire connections with member firms—until after the action was brought. The erroneous statement had been due to the similarity in the names of Municipal Securities Company and Municipal Securities Company, Inc.

Plaintiffs' Motion for Partial Summary Judgement

On April 26, 1960, plaintiffs moved "for partial summary judgment under Section 16 of the Clayton Act" permanently enjoining and restraining defendant from interfering with the operation of plaintiffs' private wire connections with member firms and from refusing to furnish Municipal, Inc. with the stock ticker service "on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment on the first cause of action set forth in their complaint * * * except with respect to the amount of damages." Municipal also moved for a preliminary injunction pursuant to Rule 65(a). Neither moved for other than injunctive relief. Plaintiffs also requested [fol. 270] "such other, further, or different relief as may seem just and proper" but only "In the event that the aforesaid motion for partial summary judgment is denied." While the memoranda submitted in support of the motions

argued that Municipal, Inc. was entitled to a judgment as to liability under Section 4 of the Clayton Act, even plaintiffs recognized that Municipal was not entitled to such judgment as it had made no showing of actual damages.

The Decision of the District Court

On June 16, 1961, Judge Bryan filed his written opinion (copy of which is annexed hereto as Exhibit A). Judge Bryan concluded that the conduct of the Exchange and its member firms in the severance of the private wire connections with the plaintiffs constituted a concerted refusal to deal in violation of Section 1 of the Sherman Act and was illegal per se, and that plaintiffs are entitled to judgment against the Exchange for treble damages, costs and attorneys fees, and to a decree permanently enjoining the Exchange from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire connections between its member firms and plaintiffs. Judge Bryan also denied Municipal, Inc.'s motion for partial summary judgment based on the withdrawal of the stock ticker service.

The order of Judge Bryan (a certified copy of which is annexed hereto as Exhibit B) was entered on August 3, 1961 and grants plaintiffs' motions for summary judgment as to the liability of the Exchange under Section 4 of the Clayton Act, 15 U.S.C. §15, and for permanent injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. §26. The limitation in the injunctive provision with respect to [fol. 271] "trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange" was made at plaintiffs' request. The order also states that "In accordance with 28 U.S.C. §1292(b) the Court is of the opinion that the issue as to the liability of defendant * * * involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal therefrom may materially advance the ultimate termination of the litigation."

Conclusion

It is respectfully submitted that, for the reasons more fully set forth in the memorandum submitted herewith, an order should be made permitting the Exchange to appeal from that part of Judge Bryan's order granting plaintiffs' motion as to the liability of the Exchange under Section 4 of the Clayton Act, 15 U.S.C. §15.

Edward J. Reilly, Jr.

Sworn to before me this 4th day of August, 1961.

Louis A. Wolf, Notary Public, State of New York, No. 30-9723500, Qualified in Nassau County, Certificate filed in New York County, Term Expires March 30, 1962.

[fol. 272]

EXHIBIT A TO AFFIDAVIT OF EDWARD J. REILLY, JR.

Opinion of Judge Bryan, June 16, 1961 Omitted. Printed side folio 218, page 203 ante.

[fol. 291]

EXHIBIT B TO AFFIDAVIT OF EDWARD J. REILLY, JR.

Order of Judge Bryan, August 2, 1961 Omitted. Printed side folio 258, page 239 ante.

[fol. 295]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY, and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-Appellees,

v.

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

ORDER DENYING PETITION FOR LEAVE TO APPEAL UNDER SECTION 1292(b) OF TITLE 28 U.S.C. AND RULE 10(d) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT—September 19, 1961

Dickstein, Shapiro & Galligan, New York, N. Y., for respondents.

Milbank, Tweed, Hope & Hadley, New York, N. Y., for petitioner.

Judges Lumbard, Moore and Friendly having voted to grant the application, and Judges Clark, Waterman and Smith having voted to deny, the application is denied for lack of a majority in favor of the application.

J. Edward Lumbard, Chief Judge.

19 September 1961.

[fol. 296] [File endorsement omitted]

[fol. 297]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO APPEAL—
September 19, 1961

A motion having been made herein by counsel for the petitioners for leave to appeal,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 298] [File endorsement omitted]

[fol. 299]

MOTION OF THE SECURITIES AND EXCHANGE COMMISSION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE HEREIN

(omitted in printing)

[fol. 303]

[Stamp—United States Court of Appeals, Second Circuit, Filed December 4, 1961, A. Daniel Fusaro, Clerk.]

[fol. 304]

ORDER GRANTING LEAVE TO FILE BRIEF AMICUS CURIAE

(omitted in printing)

[fol. 306]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY, and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-Appellees,

—against—

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

STIPULATION AS TO SUBSTITUTION OF PARTIES FILED DECEMBER 1, 1961 AND ORDER OF DECEMBER 4, 1961 GRANTING SAME

It Is Hereby Stipulated and Agreed by and between the attorneys for the parties hereto that Evelyn B. Silver, who has qualified as executrix of the estate of Harold J. Silver, deceased, pursuant to the order of the Probate Court of Dallas County, Texas, on October 30, 1961, be and hereby is substituted in the place and stead of Harold J. Silver in the within action pursuant to Rule 9 of the Rules of this Court and Rule 25 of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., December 1, 1961.

Dickstein, Shapiro & Galligan, Attorneys for Plaintiffs-Appellees.

Milbank, Tweed, Hope & Hadley, Attorneys for Defendant-Appellant.

So Ordered: December 4, 1961.

A. Daniel Fusaro, Clerk.

[fol. 307] [File endorsement omitted]

[fol. 315]

[Stamp—United States Court of Appeals, Second Circuit. Filed January 3, 1962, A. Daniel Fusaro, Clerk.]

[fol. 316]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27211

[Title omitted]

NOTICE OF MOTION FOR HEARING EN BANC—
Filed January 5, 1962

Sirs:

Please Take Notice that upon the annexed affidavit of Sidney Dickstein, sworn to the 27th day of December, 1961, the undersigned will move this Court for an order pursuant to the provisions of Section 46(c) of Title 28, United States Code providing that the appeal herein be heard and decided by this Court *en banc.*

Please Take Further Notice that this motion will be submitted for the Court's consideration without oral argument, at the office of the Clerk of the United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, County and City of New York, on the 2nd day of January, 1962 at 10:30 in the forenoon thereof.

Yours, etc.

Dickstein, Shapiro & Galligan, By Sidney Dickstein, A Member of the Firm, Attorneys for Plaintiffs-Appellees, 20 East 46th Street, New York 17, New York.

To: Milbank, Tweed, Hope & Hadley, Esqs., Attorneys for Defendant-Appellant, 1 Chase Manhattan Plaza, New York 5, New York.

[fol. 317]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27211

[Title omitted]

AFFIDAVIT OF SIDNEY DICKSTEIN

State of New York,
County of New York, ss.:

Sidney Dickstein, being duly sworn, deposes and says:

I am an attorney at law duly admitted to practice before this Court and a member of the firm of Dickstein, Shapiro & Galligan, attorneys for the plaintiffs-appellees herein. I make this affidavit in support of this motion for an *en banc* hearing and determination of the instant appeal.

The opinion of the court below is reported at 196 F. Supp. 209 and is set forth in full at pages 126-166 of the Appendix of Defendant-Appellant. As reflected by the district court's opinion, it is your deponent's view that the instant appeal involves important issues of law. The Securities and Exchange Commission has evidenced its interest in this appeal by the submission of a brief, *amicus curiae*, and an application for leave to participate in oral argument (consideration of which has been deferred to the members of this Court who will be designated to hear the appeal).

[fol. 318] Plaintiffs-appellees have moved for an order advancing the hearing on this appeal to a date prior to January 15, 1962 and this motion should be considered in conjunction with the motion for advancement. If, however, this Court, in its discretion, should desire to hear the appeal *en banc*, but cannot do so prior to January 15, 1962, counsel will be prepared to argue the appeal at any date consistent to this Court's convenience.

Wherefore your deponent respectfully prays that this Court in the exercise of its discretion order the instant

appeal to be heard and determined before the Court, *en banc*.

Sidney Dickstein.

Sworn to before me this 27th day of December, 1961.

Arthur J. Galligan, Notary Public, State of New York. No. 31-1364450, Qualified in New York County, Commission Expires March 30, 1963.

[fol. 319] [File endorsement omitted]

[fol. 320]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY, and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-Appellees,

v.

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

ORDER DENYING MOTION TO HAVE APPEAL HEARD IN BANC—January 5, 1962

Dickstein, Shapiro & Galligan, New York, N. Y., for Plaintiffs-Appellees.

All of the active judges concurring, the motion is denied.

J. Edward Lumbard, Chief Judge.

5 January 1962.

[fol. 321] [File endorsement omitted]

[fol. 322]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION FOR HEARING IN BANC—
January 5, 1962

A motion having been made herein by counsel for the appellees to have the argument of the appeal heard en banc.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 323] [File endorsement omitted]

[fol. 324]

MOTION OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

(omitted in printing)

[fol. 327]

ORDER GRANTING LEAVE TO ARGUE AS AMICUS CURIAE

(omitted in printing)

[fol. 329]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—September Term, 1961.

Argued February 7, 1962

Docket No. 27211

HAROLD J. SILVER, doing business as Municipal Securities Company, and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-Appellees,

—v.—

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

Before: LUMBARD, Chief Judge, WATERMAN and HAYS, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Frederick vP. Bryan, Judge, granting plaintiffs' motion for summary judgment permanently enjoining defendant under Section 16 of the Clayton Act from interfering with private wire and telemeter connections between its members and plaintiffs.

Reversed and remanded for further proceedings.

DAVID I. SHAPIRO, of Dickstein, Shapiro and Galligan, New York, N. Y. (Goldberg, Fonville, Gump and Strauss, Dallas, Texas, on the brief), for plaintiffs-appellees.

[fol. 330] A. DONALD MACKINNON, of Milbank, Tweed, Hope and Hadley, New York, N. Y. (Edward J. Reilly, Jr., Squire N. Bozorth, on the brief), for defendant-appellant.

PETER A. DAMMANN, General Counsel, Securities and Exchange Commission, Washington, D. C. (David Ferber, Associate General Counsel, Walter P. North, Assistant General Counsel, Faith Colish, Attorney, on the brief), for the Securities and Exchange Commission, amicus curiae.

OPINION—April 6, 1962

HAYS, Circuit Judge:

This is an action for damages and injunctive relief brought under Sections 4 and 16 of the Clayton Act. The principal issue is whether defendant by instructing its members to deny private wire service to the plaintiffs engaged in an activity prohibited by Section 1 of the Sherman Act. The lower court, granting plaintiff's motion for summary judgment, held that defendant's action constituted a concerted refusal to deal which was *per se* unlawful, and gave plaintiff a permanent injunction. 196 F. Supp. 209 (S. D. N. Y. 1961). This is the order from which the present appeal is taken. We reverse on the ground that the defendant acted in pursuance of powers granted to it by the Securities Exchange Act of 1934.

The plaintiffs, Municipal Securities and Municipal Securities, Inc. are engaged in the securities business in Dallas, Texas. Municipal Securities deals almost exclusively in municipal bonds, Municipal Securities, Inc. in over-the-counter corporate securities. They are not members of the New York Stock Exchange. Harold J. Silver was, until his death, sole proprietor of Municipal Securities. He and his [fol. 331] wife were the principal officers and directors of Municipal Securities, Inc.

In June, 1958, Municipal Securities, Inc. applied to the New York Stock Exchange for approval of private wire connections[1] with several officers of firms which were members of the Exchange.[2] The Exchange gave "temporary approval" to the proposed arrangement and the connections were installed.

Following its usual practice in such cases the Exchange ordered an investigation of Municipal Securities, Inc. and its officers. The investigation revealed several matters

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[1] Private wires, as used here, means direct telephone and telemeter connections.

[2] Municipal Securities, without applying for such approval, had at an earlier date established private wire connections with other member firms.

which appeared to the Exchange to have a bearing on whether approval of the application of Municipal Securities, Inc. should be made permanent. According to the Exchange, plaintiff Silver, in providing the information requested by the Exchange in connection with his application, had failed to list two corporations with which he and his wife had been connected, the Defense Department had suspended the security clearance of Silver and his wife and of another corporation in which the Silvers held a major interest, the Silvers had "apparently" breached an agreement involving the exchange of certain shares of stock, and there were "further disclosures of a derogatory nature."

On February 12, 1959, relying upon the results of its investigation and without notice to Municipal Securities, Inc., the Exchange "requested" its members to discontinue the private wire connections with Municipal Securities, Inc. They did so.

[fol. 332] The results of the investigation were disclosed only in the course of the proceedings in the lower court, and, then, according to the Exchange, only in part. Silver's attempts to learn from the Exchange the reasons for the cancellation of the wire services were unavailing. He was informed that the practice of the Exchange did not permit the disclosure of this information.

The lower court held that the action of the Exchange and its members constituted a concerted refusal to deal which violated Section 1 of the Sherman Act and was illegal *per se*.

It is quite clear that there would be, at the very least, a grave doubt as to the legality of the action of the defendant if it is not insulated from liability under the Sherman Act for such action by reason of the duties and obligations imposed upon it by the Securities Exchange Act of 1934. We hold, however, that the action of the Exchange in bringing about the cancellation of the private wire connections with members of the Exchange was within the general scope of the authority of the Exchange as defined by the 1934 Act and therefore outside the coverage of the Sherman Act.

The broad scope of the Securities Exchange Act is indicated by Section 2, Necessity for Regulation, which reads in part as follows:

> "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, * * * and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, [fol. 333] to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions."

The basic scheme of the Act contemplates that control over the conduct of members of securities exchanges will be shared by the Securities and Exchange Commission and the securities exchanges themselves, with the Commission exercising general supervisory power over the exchanges' self-regulation. The report on stock exchange regulation by the so-called Dickinson Committee which, at the request of the President and in collaboration with the Senate Committee on Banking and Currency, formulated the fundamental plan for the legislation in this field, stated:

> "It is not proposed that the Government so dominate exchanges as to deprive these organizations of initiative and responsibility * * * [We propose the formation of] a Government agency operating in this field, and endowed with wide powers to license or close exchanges, coupled with the reserve power to license individual brokers * * *, and to make rules and regulations concerning a delicate mechanism like the stock exchange [which] must be * * * so constituted as to place responsibility to the fullest extent possible on the private bodies now handling the work of security exchanges."

"[I]t seems distinctly better, in the opinion of your committee, to stimulate the exchange to further disciplinary activity by holding it to a high degree of accountability for the conduct of [its] members."[3]

[fol. 334] The House Committee Report on the bill which became the 1934 Act said:

"It is hoped that the effect of the bill will be to give to the well-managed exchanges that power necessary to enable them to effect themselves needed reforms and that the occasion for direct action by the Commission will not arise."[4]

The Senate Committee Report said:

"Thus the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so."[5]

The structure of the Act bears out this purpose. Section 6(a) requires an exchange upon registering with the Commission to file a registration statement containing "an agreement * * * to comply, and to enforce so far as it is within its powers compliance by its members, with the provisions of" the Act and the Commission's rules and regulations thereunder. Section 6(a)(3) requires the filing with the Commission of copies of the constitution of the Exchange, and its rules. The Exchange must provide "an agreement to furnish to the Commission copies of any

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[3] Stock Exchange Regulation—Letter of Transmittal from the President of the United States to the Chairman of the Committee on Banking and Currency with an Accompanying Report Relative to Stock Exchange Regulation, Senate Committee Print, 73rd Cong., 2d Sess. (1934) pp. 6, 7, 8.

[4] H. R. Rep. No. 1383, 73rd Cong., 2d Sess. 15 (1934).

[5] S. Rep. No. 792, 73rd Cong., 2d Sess. 13 (1934).

amendments to the rules of the Exchange forthwith upon their adoption." (Section 6(a)(4).) The rules of the Exchange must "include provision for the expulsion, suspen- [fol. 335] sion or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade," and must be "just and adequate to insure fair dealing and protect investors." (Section 6(d).)

Under Section 19 the Commission is authorized "if in its opinion such action is necessary or appropriate for the protection of investors—

> "(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this chapter or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon."

Section 19(b) provides:

> "The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial [fol. 336] responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any se-

curity within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

In accordance with the requirements of the Act, the constitution and rules of the defendant New York Stock Exchange were filed with the Commission. Article III, Section 6, of the constitution provides that the Board of Governors of the Exchange "shall have supervision over all matters relating to the collection, dissemination and use of quotations and of reports of prices on the Exchange and shall have the power to approve or disapprove any application for ticker service to any non-member, or for wire, wireless, or other connection between any office of any member of the Exchange, member firm or member corporation and any non-member, and may require the discontinuance of any such service or connection."
[fol. 337] Rules 355 and 356 as they read in 1958 provided:

"Rule 355. (a) No member or member organization shall establish or maintain any wire connection, private radio, television or wireless system between his or its offices and the office of any non-member, or permit any private radio or television system between his or its offices, without prior consent of the Exchange.

(b) Every non-member will be required to execute a private wire contract in form prescribed by the

Exchange to be filed with it, unless a contract is already on file with the Exchange.

(c) Notification regarding a private means of communication with a non-member and the signed contract when necessary shall be submitted to the Department of Member Firms. This notification, by a member or allied member, may be in form supplied by the Exchange or in letter form, and shall include the essential facts concerning the non-member and the means of communication.

(d) Each member or member organization shall submit annually to the Department of Member Firms a list of all non-members with whom private means of communication are maintained.

(e) The Exchange may require at any time that any means of communication be discontinued.

Rule 356. The Exchange may require at any time the discontinuance of any means of communication whatsoever which has a terminus in the office of a member or member organization. * * * "

As Judge Clark said in *Baird* v. *Franklin*, 141 F. 2d 238, 244 (2d Cir.), cert. denied, 323 U. S. 737 (1944), the Act [fol. 338] makes it the duty of the Exchange to enforce the rules which it is required to file with the Commission.

"There can be no doubt that §6(b) places a duty upon the Stock Exchange to enforce the rules and regulations prescribed by that section. Any other construction would render the provision meaningless. Defendant's argument that the Securities Exchange Act did not alter the prior status of the Stock Exchange Rules as by-laws of a private club is untenable. If all that §6(b) meant was that every exchange should pass token regulations, incapable of enforcement except at the wish of the exchange itself, there would have been no purpose for its inclusion in the Act. Sections 6(b) and (d) were surely intended to be read together, and the latter makes it clear that the pur-

pose of the requirements of the former is 'to insure fair dealing and to protect investors.' This can be realized only if §6(b) is construed as imposing the two-fold duty upon an exchange of enacting certain rules and regulations and of seeing that they are enforced."*

See also 2 Loss, Securities Regulation 1178 (1961)..

To summarize: The structure of the Securities Exchange Act of 1934 and its legislative history disclose that the Act was designed to require that the Securities and Exchange Commission share with the exchanges themselves the governancce of those matters which the Act regulates. The constitution and rules of the New York Stock Exchange are filed with the Commission. It is reasonably to be presumed that those regulations have the approval of the Commission since it has not taken the action which it [fol. 339] is empowered by the statute to take to bring about their amendment. The Exchange is required by virtue of the statute to enforce its rules. As long as the Exchange acts within the scope of its statutory authority in the enforcement of its rules its action cannot be condemned as within the prohibitions of the Sherman Act.

But, it is argued, and the lower court held, that the Exchange exceeded its authority in the present case in acting with respect to dealings in over-the-counter securities. It may be, it is said, that the Exchange is free from the restrictions of the anti-trust laws so long as it confines its activity to matters which relate to securities which are listed on the Exchange; but when it goes beyond these limits and purports to exercise authority over dealers in the over-the-counter market it subjects itself to a charge of violation of the Sherman Act.

There is no justification in the Securities Act for drawing a distinction between the control which the Exchange is called upon to exercise over its members when they are dealing with listed securities and when they are dealing with other securities. On the contrary there are a number

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* While Judge Clark dissented on another issue, his statement on this point reflected the view of the Court.

of references in the Act to activities connected with unlisted securities or with "any" securities (see e.g. Section 7(c)(2), Section 8(c), Section 10(b)).

The Commission urges that this case be determined "without casting any doubt upon the right and duty of registered stock exchanges to discipline their members who are engaged in practices contrary to just and equitable principles of trade, including violations of the Securities Exchange Act of 1934, and the Commission's rules thereunder, regardless of whether such practices relate to listed or unlisted securities, and whether a non-member may be indirectly adversely affected."[7] The Commission has long [fol. 340] recognized that what a member of an exchange does as an over-the-counter dealer has an important connection with his membership in the Exchange. In a number of cases members have been expelled or suspended from membership on securities exchanges as a penalty for derelictions in their over-the-counter business. See e.g. *Walston and Co.*, 7 S. E. C. 937 (1940), modified 9 S. E. C. 660 (1941), petition for review dismissed, 121 F. 2d 1019 (9th Cir. 1941); *W. K. Archer & Co.*, 11 S. E. C. 635 (1942), aff'd, 133 F. 2d 795 (9th Cir. 1943); *Robert DeForest Boomer*, 13 S. E. C. 102 (1943); *Mason, Moran & Co.*, 35 S. E. C. 84 (1953); *R. L. Emacio & Co.*, 35 S. E. C. 191 (1953).

The New York Stock Exchange is performing a vital public function. Its standing and reputation are important to the national economy.

"The bill proceeds on the theory that the exchanges are public institutions," said the House Committee Report[8] referring to the bill which later became the Securities Exchange Act of 1934.

Mr. Justice Douglas, when he was Chairman of the Securities and Exchange Commission, said:

> "I have always regarded the exchanges as the scales upon which that great national resource, invested

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[7] Brief of Securities and Exchange Commission, *amicus curiae*, p. 14.

[8] H. R. Rep. No. 1383, 73rd Cong., 2d Sess. 15 (1934).

> capital, is weighed and evaluated. Scales of such importance must be tamper-proof, with no concealed springs—and there must be no laying on of hands. * * * Such an important instrument in our economic welfare * * * must be surrounded by adequate safeguards."[9]

[fol. 341] It is highly important for the proper operation of the Exchange as a public institution that its membership and procedures continue to enjoy the confidence of investors. The reputation of the Exchange is a valuable asset from the public point of view. The Exchange must have sufficient power of discipline over its members to enable it to enforce the high standards of conduct which the Act contemplates. If it is to have the requisite power it cannot be hamstrung by an unjustifiable limitation based upon whether its members are at the moment dealing in listed or in unlisted securities.

We conclude that the statute gives the Commission and the Exchange disciplinary powers over members of the Exchange with respect to their transactions in over-the-counter securities, and that the policy of the statute requires that the Exchange exercise these powers fully. In the exercise of such powers the Exchange is not subject to the restrictions of the Sherman Act.

The next question presented is whether this immunity applies regardless of the correctness or, indeed, reasonableness of a particular decision. Does a securities exchange, while acting within the general scope of its authority to discipline its members, fall into the ambit of the Sherman Act when a particular decision is arbitrary or unreasonable? To find that the Sherman Act applies in such a situation would go far toward defeating the statutory policy of self-regulation. If securities exchanges were in constant danger of subjecting themselves to liability under the anti-trust laws for any misapplication of their disciplinary powers, they would understandably be reluctant to fulfill their obligations under the Securities

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[9] Douglas, Democracy and Finance (1940) 64, 65.

Exchange Act. Cf. *Booth* v. *Fletcher*, 101 F. 2d 676, 680 (D. C. Cir. 1938), cert. denied, 307 U. S. 628 (1939). When the exchanges are acting other than in "the clear absence [fol. 342] of all jurisdiction over the subject matter," *Bradley* v. *Fisher*, 80 U. S. 335, 351 (1871), they are secure from such liability to a person aggrieved by their action. In the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation. Cf. *Gregoire* v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949), cert. denied, 339 U. S. 949 (1950).

What has been said does not mean that if the action of the Exchange was arbitrary or unreasonable appellees are without a remedy. The Exchange is exempt from the restrictions of the Sherman Act because it is exercising a power which it is required to exercise by the Securities Exchange Act. The availability of judicial review is a necessary concomitant of the exercise of such power. See *Steele* v. *Louisville & Nashville Railroad Company*, 323 U. S. 192 (1944); *Conley* v. *Gibson*, 355 U. S. 41 (1957); Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 769, 800-808 (1958). Compare Administrative Procedure Act §10a, 5 U. S. C. §1009(a) (1958). That the statute is silent on the question of judicial review is, of course, not decisive. *Estep* v. *United States*, 327 U. S. 114, 120 (1946).

The lower court, examining the situation for possible application to it of the "rule of reason" under the Sherman Act, found that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiff's wire connections be severed." 196 F. Supp. at 227. Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary.

The question therefore arises as to whether the judgment below should be affirmed because an injunction might [fol. 343] have been available to the plaintiff had the suit sought relief from the Exchange's arbitrary action rather than the remedies provided by the Clayton Act. This is not,

however, a case for the application of the accepted rule that a judgment which grants an appropriate remedy will not be reversed merely because the correct result was reached on an erroneous theory. See Fed. Rules Civ. Proc. 54(c); *Mackintosh* v. *Estate of Marks*, 225 F. 2d 214 (5th Cir. 1955); *Psinakis* v. *Psinakis*, 221 F. 2d 418, 423 (3rd Cir. 1955); *Shelley* v. *Union Oil Co.*, 203 F. 2d 808 (9th Cir. 1953). In this case we cannot be certain that, if the plaintiff had not proceeded under the Sherman Act, the parties would not have treated the controversy quite differently. The plaintiff, for example, might even have sought another remedy. The Exchange might have determined to grant the plaintiff an opportunity to rebut the charges made against him. Had the district court been guided by the principles set forth in this opinion, it might have choosen to hold a hearing and to hear witnesses instead of deciding the issues by summary action and injunction.

We therefore reverse and remand to give the parties and the district court an opportunity to reconsider the case in the light of our opinion.

WATERMAN, Circuit Judge (dissenting):

I dissent. I would affirm on the opinion of Judge Bryan below, reported at 196 F. Supp. 209 (S. D. N. Y. 1961).

[fol. 344]

WATERMAN, Circuit Judge (dissenting):

The majority opinion gives the appellant a significant privilege to which I believe no statute entitles it. Moreover, without mentioning that they have done so, the majority have apparently discredited that portion of the landmark decision of Judge Medina in *United States* v. *Morgan*, 118 F. Supp. 621 at 697 (S. D. N. Y. 1953), in which he discussed the statutory scheme of the Securities Acts of 1933 and 1934 and stated that those acts do not create any implied exemptions from the Sherman Act.

In other provisions of the Securities Exchange Act, namely those sections governing over-the-counter brokers'

and dealers' associations, 52 Stat. 1070 (1938), 15 U. S. C. §78*o*-3 (1958), the draftsmen of our securities statutes provided an explicit exemption from the antitrust laws. 15 U. S. C. §78*o*-3(n) (1958). The presence of explicit exemptions in certain parts of a statute should make us hesitate to find a congressional intention to create implicit exemptions elsewhere in the same legislation.

In *United States* v. *Borden Co.*, 308 U. S. 188 (1939), involving the scope of the Agricultural Marketing Agreement Act, 7 U. S. C. §§601-59 (1958), it was argued that by the passage of that regulatory legislation Congress had created an implied exemption from the antitrust laws. The Supreme Court rejected the argument, stating, at pp. 197-198:

> In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of Section 1 of the Sherman Act with respect to the marketing of agricultural commodities.
>
> We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as [fol. 345] we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create "so great a breach in historic remedies and sanctions."
>
> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible.

As a further reason for not reading in any implied exemption in that statute the court also pointed out, at 200-01, that the Agricultural Marketing Act provided explicit exemptions to the antitrust laws in those areas where that was the congressional intention. And in *Georgia* v. *Pennsylvania R.R. Co.*, 324 U. S. 439 (1945), the Court stated, at pp. 456-57:

> These carriers are subject to the anti-trust laws. *United States* v. *Southern Pacific Co.*, 259 U. S. 214. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505. Congress by §11 of the Clayton Act entrusted the Commission with authority to enforce compliance with certain of [fol. 346] its provisions "where applicable to common carriers" under the Commission's jurisdiction. It has the power to lift the ban of the anti-trust laws in favor of carriers who merge or consolidate (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25-26) and the duty to give weight to the anti-trust policy of the nation before approving mergers and consolidations. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not *per se* exempt from the Sherman Act. *United States* v. *Borden Co.*, 308 U. S. 188, 198 *et seq.* It is true that the Commission's regulation of carriers has greatly expanded since the Sherman Act. See *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 385-386. But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to

the extent of the repugnancy. *United States* v. *Borden*, *supra*, pp. 198, 199. None of the powers acquired by the Commission since the enactment of the Sherman Act relates to the regulation of rate-fixing combinations. Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. In view of this history we can only conclude that they have no immunity from the antitrust laws.

[fol. 347] I believe with Judge Bryan that, as applied to the facts in this case, there is no clear repugnancy between the Securities Exchange Act of 1934 and the Sherman Act, which requires the blanket exemption from the antitrust law which the majority here finds.

The majority believes that it can leave enforcement of the antitrust laws in the hands of the Securities and Exchange Commission despite the fact that that agency's expertise does not involve matters of antitrust law, and it does not appear that Congress intended that the Commission was to be an overseer of the antitrust laws. I do not subscribe to that belief.

[fol. 348]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Hon. Paul R. Hays, Circuit Judges.

EVELYN B. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY, and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-Appellees,

v.

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

JUDGMENT—April 6, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO, Clerk.

[fol. 349] [File endorsement omitted]

[fol. 350] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 351]

SUPREME COURT OF THE UNITED STATES

No. 150—October Term, 1962

HAROLD J. SILVER, d/b/a
MUNICIPAL SECURITIES COMPANY, et al., Petitioners,

vs.

NEW YORK STOCK EXCHANGE.

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.